# IN THE COURT OF APPEALS OF TENNESSEE
## FOR THE MIDDLE SECTION, AT NASHVILLE

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| In re: Sentinel Trust Company | ) | No. M2005-00031-COA-R3-CV |
| | ) | Lewis Equity No. 4781 |

**APPEAL FROM FINAL JUDGMENTS OF THE LEWIS COUNTY CHANCERY COURT AT HOHENWALD, TENNESSEE**

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Brief for Appellants
Semtinel Trust Company, Danny N. Bates, Clifton T. Bates, Howard H. Cochran, and Gary L. O'Brien

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**Oral Argument Requested**

# TABLE OF CONTENTS

## TABLE OF CASES AND OTHER AUTHORITIES

# IN THE COURT OF APPEALS OF TENNESSEE
## FOR THE MIDDLE SECTION, AT NASHVILLE

| | | |
|---|---|---|
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Appellants' Brief

## I.

## ISSUES PRESENTED FOR REVIEW

Question No. 1: Whether the proceedings in the chancery court regarding Sentinel Trust Company (a trust company acting primarily as indenture bond trustee under over two hundred bond-indentures) were within its jurisdiction in light of all applicable constitutional (both Tennessee and U. S.) and statutory provisions cited herein, when—

*i)* The law purporting to empower the Commissioner of Financial Institutions (hereinafter, Commissioner) to seize a financial institution, impose receivership thereon, remove corporate directors, take over the operation of the institution's business, and invoke chancery jurisdiction for limited purposes therein stated (hereinafter collectively referred to as "seizure powers") does not provide that such powers and jurisdiction may be exercised over trust companies, but only banks having **depositors** and other specifically-named types of institutions,

*(ii)* even if seizure were conditionally authorized *(e.g.,* were authorized for exercise against a non-depository trust company without banking powers), no due-process hearing upon charges was

afforded Sentinel Trust Company prior to the seizure of its properties, the statute under which the Commissioner claimed to act did not empower him to so seize an institution without prior hearing except where necessary to protect the interests of depositors, and Sentinel, as all non-bank trust companies, had never had authority to accept deposits nor ever had any depositors,

*(iii)* the Commissioner's factual claim that Sentinel had become insolvent was false, both as a matter of universal knowledge and as shown by affidavit, by his rationale that Sentinel's **assets *held in its fiduciary capacity*** constituted **liabilities** and by his disregard of the multiplying effect of monthly interest compounding on such assets to be held, to the extent collected, for the benefit of trust funds, *e.g.,* for the benefit of the bond-issuers,

*(iv)* the Commissioner's claim of seizure activity powers over a non-bank trust company because of actions pretended by him to be breaches of Sentinel's fiduciary obligations is without legal foundation, because the enforcement of such obligations is solely a judicial power and not within the Commissioner's statutory authority, not only for a trust company, but even for a *bank in its exercise of fiduciary powers,* over which charged breaches the Tennessee Banking Act gives him no authority;

*(v)* the powers claimed and *de facto* exercised by the Commissioner not being authorized by the plain language of the statutory provisions he invoked, it is not possible, by actually following the Tennessee law of statutory construction, to construe the statutes invoked by the Commissioner to empower him to exercise bank seizure powers over a non-bank and non-depository trust company.

**Question No. 2:** Apart from the lack of authority to invoke the chancery court's limited jurisdiction as set out above, whether the chancery court's prior orders finalized by its "final judgments," together with new orders made therein, were legally void for the reason that **even if Sentinel had been a bank,** many such orders were beyond the court's narrowly-defined jurisdiction, as sought to be invoked by the Commissioner, in that, *inter alia,*

(i) The Court was given no authority to approve a giving away of Sentinel's valuable assets, having a reasonable value to it in excess of $4 million, by granting the Commissioner-sought approval of giving Sentinel's profitable trust accounts—funds held in trust by such a company—to SunTrust Company (even if the fiduciary company be insolvent), not being legally within the power of disposition that may be held by a financial institution's receiver, trustee in bankruptcy, or court overseeing such an official;

*(ii)* the invoked statutes give the Court no jurisdiction to permit or forbid the transfer of trust assets, whose right to control was given to trust settlors, being bond-indenture issuers, in their exclusive power to remove the trustee and appoint a substitute trustee without cause;

*(iii)* the court's narrow jurisdiction did not include any purported power to remove and appoint substitute bond registrars or bond paying agents, nor to bar the bond-indenture issuers from appointing their own substitute trustees with or without cause, **all of the foregoing because** under Tennessee law, when statutory jurisdiction is given to a court to order only particular remedies under stated circumstances, orders entered by such court going beyond the scope of the remedies authorized are void for lack of jurisdiction.

**Question No. 3:** Even when exercising statutory power to seize an insolvent bank with fiduciary powers *(i.e.,* with a trust department acting as trustee), whether the Commissioner's statutory duty to "terminate all fiduciary positions" imposed by T.C.A. § 45-2-1504(c ) empowers him to "cherry-pick" by transferring only the bond issues not in default, and retaining the defaulted ones in which costly liquidation collection proceedings are underway by the corporate trustee whose business he has seized, and to transfer such accounts, without requiring a purchase-price, to a bank (a) which did not bid for them and (b) as to which the Commissioner had been employed in an executive capacity before his appointment to the office of Commissioner.

**Question No. 4:** Whether the statute under which the Commissioner claimed to act, the Tennessee Banking Act, apart from the foregoing, is unconstitutional on its face, because it attempts

to vest in the Commissioner, a member of the Executive Department of Tennessee's government, certain powers which may be vested only in the judiciary, including the judicial power to appoint receivers, the judicial power to remove corporate directors, and the judicial power to bring about the dissolution of a corporation for insolvency, as well as the legislative power to make provisions of the Tennessee Banking Act applicable or inapplicable to non-banking corporations, at his pleasure.

## II.

## STATEMENT OF THE CASE

### *Nature of the Case:*

There were no pleadings in the case, nor any litigation, in the normal procedural sense, because no complaint was filed, no leading process issued, nor any defendants sued, nor was any property seized by court order so as to create *quasi in rem* jurisdiction. The Commissioner, claiming to have seized and taken over the operation of Sentinel Trust Company under statutes purporting to create these powers and empowering the Commissioner to exercise them over **state banks** under his own authority, T.C.A. §§ 45-2-1502 and 45-2-1504, required him to submit, for the local Chancery Court's approval, a series of discrete, specifically-described decisions made by him, which particular decisions the local Court is empowered to approve or disapprove by T.C.A. §§ 45-2-1502(c)(2), 45-2-1504(a)(1)–(3), 45-2-1504(f), and 45-2-1504(g).

### *Course of the Proceedings:*

All issues brought before the Chancery Court (hereinafter referenced, where appropriate, as "the local Court") by the Commissioner or the Receiver he in fact appointed, purportedly under the authority of T.C.A. § 45-2-1502(b), were claimed to have been presented to the Court under no statutory authority except the provisions T.C.A. § 45-2-1502, *et seq.*, unless presented under

instructions of the Commissioner[1] for which he cited no statutory authority.

Appellants appeared, through counsel, at the first hearing held by the Court upon a motion by the Commissioner's Receiver and stated certain objections and their legal position for the Court's consideration as continuing objections in ruling upon that pending motion and all subsequent motions that might be made, so that the Court could consider them in its future rulings (June 29, 2004 Tr., R., Vol. XI, pp.11-18) also filing an authenticated copy of the sworn Petition for *Certiorari* and *Supersedeas* they had filed in the Davidson County Chancery Court as an exhibit **(Ex. 1 ).**[2] They appeared through counsel at another hearing (July 12, 2004 Tr., R., Vol. XII) and filed sworn objections with supporting exhibits (R., 987-1122) to the motion to transfer some of Sentinel's trust accounts and some of its assets, and argued the same (November 15, 2004 Tr., R., Vol. XIII).

Responsive to repeated motions filed by the Commissioner's Receiver, numerous orders were entered approving payments to bondholders under selected issues,[3] authorizing the sale of trust assets pursuant to liquidation litigations in which Sentinel had been involved,[4] approving fees as requested by the receiver and those working under it,[5]allowing payment of receivership fees from the proceeds of liquidation recoveries on defaulted bond issues,[6] and orders permitting intervention of bond-issuers which desired their trust records and funds transferred to new trustees they had selected,[7] but

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[1]There was no statute purporting to empower the Commissioner to enlarge the local court's statutory jurisdiction beyond that enacted by the Legislature.

[2]Further references to that exhibit are followed, where needed by italicized references to its *exhibits* to that petition and its *attachments,* being supporting affidavits.

[3]R., I:115, 120, V:662, 666, VI:707, 727, VII:851, 884, VIII:969, X:1224, 1245, 1248, 1252.

[4]R., I:118, V:642, VIII:928, 948, X:1221.

[5]R., II:236, VI:705, 849, VII:887, VIII:958, X:1219, 1256.

[6]R., II:240, V:649.

[7]R., V:652, 654.

denying permission for such transfers to successor trustees.[8]

Finally, there was a motion to transfer Sentinel's Fiduciary Positions to Successor Fiduciaries selected by the Commissioner (R., VII:889-927),[9] to which Sentinel and its Directors filed extensive objections with supporting documentation (R., VIII:978 – IX:1132). The Commissioner urged that the approval order be entered November 15, 2004 so that it would be final and no longer appealable by December 15, 2004, as argued (Nov. 15, 2004 Tr., R., XIII, pp. 24-26), with the recipient of most of the trust accounts being SunTrust Bank of Georgia, with Sentinel's trust account being held in SunTrust Bank in Nashville, a correspondent bank of the National SunTrust, headquartered in Florida (Ex. 1, Statement of Charges, *Ex. A,* p.5, ¶ 13), and the contract provided as to both the bank used as transferee and the Receiver that the approval order, to be obtained on November 15, had been neither stayed **nor appealed,** but the case had in fact been appealed before the December 15 deadline (R, X:1254).[10] Once the contract has been approved, there is no requirement that the Commissioner report to the Court whether it was carried out, and the record cannot show whether subsequent agreements were made to assure the retention of the prudent power to reverse any developments in the event of appellate reversal.

Two final decisions made by the Chancery Court purported, *inter alia,* to authorize the Commissioner to transfer certain assets and selected trust accounts to other banks,[11] and appellants appealed these orders by timely notice of appeal. Further proceedings continue in the Lewis County Chancery Court, and *certiorari* proceedings continue in the Davidson County Chancery Court,[12]

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[8]R., V:710-711.

[9]Summarize give-away parts.

[10]Argument re finality INSERT.

[11]R., IX:1133-1195, X:1240-1244.

[12] In the event either of these should eventuate in additional final judgments in either Lewis or Davidson County before this appeal is set for hearing and either should be appealed, Appellants intend to move to consolidate all appeals for a single hearing so that this Court will

hereinafter, the *Certiorari* Court.

***Decisions of Chancery Court:***

The final decisions and all important interlocutory orders were favorable to the Commissioner's position, and although the Court received and heard detailed arguments for Appellants asserting total lack of jurisdiction and power in the Court, in the Commissioner, and in the Commissioner-Appointed receiver, the Court did not issue any order or opinion enunciating any rationale for rejecting any of the objections by these Appellants.

## III.

## STATEMENT OF FACTS

***Introductory re: Scope of Factual Record—***

The facts can be appreciated more easidly after any reader knows the general statutory scheme under which those facts arose. The details are more appropriately explored in the discussion of statutory construction issues *(infra,* pp.24-32), but banks have long been subjection to regulation initially by the Superintendent of Banks within the Department of Insurance and Banking, since separated from insurance regulation into its separate department headed by the Commissioner of Financial Institutions (herein, the Commissioner), with remedial authority over disruptive bank

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have the largest possible scope of knowledge despite the differences in appellate records. A more complete picture of litigation attempts that did not eventuate in appealable final judgments was the *certiorari* Court's interlocutory denial of the writ of *supersedeas,* as to which that court allowed a discretionary appeal which this court refused to accept, *Sentinel Trust Co., et al. v. Lavender, Com'r.,* M2004-02068-COA-R10-CV. Appellants also sought injunctive relief upon federal Constitutional grounds in the U. S. District Court for the Middle District of Tennessee (R., 980-981, ¶ 1(d), and R., 983-1007) which that Court dismissed without ruling on its merits and without prejudice due to comity deference to state jurisdiction, *Sentinel Trust Co., et al. v. Lavender, Com'r.,* 2004 U.S. Dist LEXIS 27259.

insolvency situations. Trust companies had never been under this regulatory authority, but 1980 legislation first required departmental approval for incorporation of a new trust company and placed such new companies under the Commissioner's regulatory authority, while preserving to pre-existing chartered trust companies (including Sentinel) their right to continue serving as corporate trustees under their corporate charters without administrative oversight.[13]

In 1999, for the first time, pre-existing trust companies were brought under the Commissioner's regulatory authority by Chapter 112, Public Acts of 1999, amending the Tennessee Banking Act, being Chapters 1 and 2 of T.C.A. Title 45. Both before and after the 1999 amendments, power-granting provisions of the Banking Act had vested powers in the Commissioner, after making the necessary determinations in a hearing, to seize any insolvent state bank, followed by either rehabilitation or liquidation; and he had been empowered to make such bank seizure without a prior hearing **only** upon finding that "an emergency exists which will result in serious losses to the depositors, . . .", T.C.A. § 45-2-1502(c). But whether seizure was made with or without prior hearing, these Banking Act provisions empowered the Commissioner to seize,[14] operate, and appoint an overseeing receiver over an insolvent bank without judicial intervention, and without substantial disclosure to local Court of any facts about the reasons for the Commissioner's seizure and receivership-imposition.

The mode of administrative bank-seizure was by issuance of a notice of seizure, a copy of which was required to be filed in that county's chancery or circuit court, and thereafter, upon making certain decisions, the Commissioner was required to submit these to the Court for approval or disapproval. Typical examples of these decisions were decisions to borrow money from the Federal

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[13]For-profit trust companies are not within the statutory responsibility of each district attorney-general to file litigation, where warranted, for the protection of charitable or public trusts. T.C.A. § 29-35-102.

[14]The legality of his administrative seizure action authority are reviewable upon writ of *certiorari* usually sought in Davidson County, as the County of the Commissioner's official residence.

Reserve Bank to finance bank receivership operation and liquidation costs, T.C.A. § 45-2-1502(c)(2), selling any of the bank's property worth over $500.00, or settling any claims against the bank for over $500.00, T.C.A. § 45-2-1504(a).[15] Therefore, apart from the original conclusory notice of his seizure actions, the Court's record is not required to contain any factual basis of the actual vesting of such powers. Hence except for defensive filings, the record is—and was contemplated by statute to be—merely a series of requests for approvals culminating in the filing of a final accounting subject to the Court's approval and filing a schedule of the Commissioner's determinations to allow or disallow creditor claims against the insolvent bank, with the Court empowered to rule upon objections to claim-rejection determinations, T.C.A. § 45-2-1504(g) and (k).

Hence most of the facts[16] relevant to the issues on this appeal are in the limited sworn filings by these appellants, or other objecting parties, made in the Chancery Court, with a smattering of facts gathered from the numerous motions filed, with the initial filings by the Commissioner in the Chancery Court being mere formal notices (R., I:1, 3),[17] the Commissioner's filings not containing—nor required to contain—even the Statement of Charges against the allegedly insolvent financial institution which led to the seizure.

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[15]In relation to conduct of the seizure-receivership activities, the Commissioner can pay all of *his own claims for expenses* without court approval, T.C.A. § 45-2-1504(a)(3), presumably because these are payable, after exhausting the "state bank's" assets, T.C.A. § 45-2-1502(f), either from departmental funds under the Commissioner's discretionary control or from the moneys borrowed from a Federal Reserve Bank to pay the costs of administering the receivership, as referenced in the text above.

[16]It is believed that the record reveals no real difference (or conflicting evidence) as to the facts, but only as to inferences that should be drawn from the indisputable facts. Affidavits by Sentinel's controlling owner Bates, based upon Sentinel's pre-seizure records and computations made as described within such affidavits are within the Commissioner's power to check and refute, if erronious, as the Commissioner holds control of all Sentinel's records and has personnel with the qualifications to check, duplicate, and either confirm or refute the computations, and no such refuting affidavits have been filed by the Commissioner.

[17]These references are to the volume and page numbers of the Technical Record.

It is important that in the hearing of the first motion presented to the Court, Sentinel appeared through counsel appointed by its Board of Directors, and asserted that although Sentinel denied that the Commissioner had statutory power to seize Sentinel, the primary jurisdiction to review the legality of the seizure was vested in the Davidson County Chancery Court, with which position the Attorney-General agreed (June 30, 2004 Tr., R., Vol. XI pp.25-26, 40-41), and stated other Sentinel positions as to the Court's powers, in the nature of a continuing objection on future motions..

***Facts Established by Filings:***

The a copy of the sworn petition for *Certiorari* and *Supersedeas* filed in the Davidson County Chancery Court was received in evidence as an exhibit **(Ex. 1)** in the Court below without objections and, as it may be referenced in arguments, contained legal theories with appropriate references to constitutional and statutory provisions asserted to be controlling, and necessary to an understanding of the facts and issues. It also contained factual allegations and supporting documentation in the form of exhibits of evidentiary documents or instruments, and attachments of supporting affidavits, and these are summarized below in what is hoped to be the most orderly way for any reader's convenience.

***Facts re: Sentinel's Normal Business Operations and its Developing Difficulties—***

Since long before Sentinel was brought under the administrative authority of the Director of Financial Institutions by the 1999 legislation referenced above, it has been a Tennessee corporation authorized by its corporate charter to engage in business as a trust company, *i.e.,* it received moneys in trust from trust settlors to be held and disbursed for trust beneficiaries, as distinguished from the operations of a bank, which receives deposits that create the debtor-creditor relation, T.C.A. § 45-1-103(3), (9), and (10), so that the deposits are the bank's own money which it can invest for its own profit without sharing with depositors, to each of whom it owes only the obligation to repay the balance of the deposit immediately upon demand with such interest, if any, as accrued under the agreement between the bank-debtor and its depositor-lender **(Ex. 1, ¶¶** 3-4, pp. 3-4).

Continuing after it came under the provisions of the Tennessee Banking Act on July 1, 1999, Sentinel's business was serving as trustee, registrar, and/or paying agent under bond indentures governing bond issues by private corporations, by municipalities, and by private-activity entities issuing tax-exempt bonds under the sponsorship of cities or counties whose public credit was not pledged **(Ex. 1,** ¶ 13, p. 10). For the most part, these monies were deposited in a pooled trust fund (as the Commissioner accurately characterized it) held at SunTrust Bank in Sentinel's name in a checking account and another account holding securities in the name of Sentinel Trust Company, but Sentinel's books accurately showed the name of the trust issue owning[18] each security and in the checking account, the name of each trust fund, and the amount held by it, which amounts made up the total in the pooled trust fund.

Many of the tax-exempt private-activity bonds issued under the names of government entities as authorized by federal law were driven into insolvency when 1997Congressional changes in Medicare reimbursement rights destroyed their income, so that some 63 bond issuers went into default over the following years, obligating Sentinel to seek to liquidate their collateral through litigation; Sentinel had worked through **all but 13 of these defaulted issues** by the time of the seizure actions of May 18, 2004 **(Ex. 1,** ¶ 14, pp. 10-11).

In all litigation and other collection activities, Sentinel charged all expenses against the appropriate bond fund and defaulted bond issue, so that payments came out of that issue's total funds in the pooled bond funds until that defaulted fund ran out of money, and from that point forward, they were treated as overdrafts, resulting in negative balances, and Sentinel maintained that was the way such expenses were handled by bank trust departments **(Ex. 1,** ¶ 14). Inasmuch as the negative balances in each overdrafted account (on Sentinel's books) produced an actual reduction of the

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[18]Of course, the actual ownership was that Sentinel owned legal title to the funds, which were equitably owned by the bondholders and bond-issuers, each of which would be entitled to the refund of its sinking funds and other unused moneys after payments to all bondholders.

amount of "cash" [19] held in the SunTrust "pooled trust fund," Sentinel had to assure that there was proper accounting so the pooled trust fund would not lose any money.

To achieve this, Sentinel at all times credited each bond fund holding a cash (positive) balance with earnings at the rate of the average daily earnings of the entire fund as credited by SunTrust each month. As to each overdraft, from the moment it occurred, that account incurred an additional monthly charge of 1½% per month which therefore compounded monthly because the monthly charge increased the negative balance, this being in accordance with its formal schedule showing all fees and charges **(Ex. 1,** ¶ 17, p. 12 and *Ex. I).* In effect though not in form, this was the same as the "pooled bond fund"—admittedly a non-entity—"lending" the amount of the overdraft to each default fund in overdraft status at a charge of 1½% per month compounded monthly.

With the time-consuming requirement of liquidation litigation, the compounding monthly charge increased the overdraft balances far above the amounts of actual moneys spent, so that over a 5-year period,[20] the asset owned by Sentinel in its fiduciary capacity, *e.g.,* by the "pooled fund," would be more than double the amount of the informal "loan" so that a $500,000 overdraft, if repaid 5 years later, would result in the fund receiving the $1,221,609.89 required to "zero out" the overdrafted account **(Ex. 1,** ¶ 17, p. 12, and R., 1074-1075, ¶ 6). This was apart from the separate fees in Sentinel's list of fees, and it furnished a measure of protection against the possibility of Sentinel's inability to liquidate collateral on some individual bond issues for enough money to overcome that issue's negative balance—of which negative balance, the actual amount of money borrowed was necessarily only a fraction, likely a small fraction, of the negative balance due to the compounding effect, and after liquidation of all negative balances, any profits will be the property

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[19]This was not actually "cash" but credits, because most of every bank's money is invested and its limited legally-required "reserves," are deposited in a Federal Reserve Bank except for the limited amounts of "vault cash" required for its cash transactions **(Ex. 1,** ¶ 3, p. 3).

[20]This is not an unreal example, because five years had passed since the defaults occurred mostly in 1999, and the 13 remaining issues in liquidation were necessarily of long duration.

of the pooled fund, to be apportioned between all the bond issues that were never in default *(id.)*. After seizure, with Sentinel having no access to its records, it alleged that the remaining cumulative total of all overdrafted balances on the 13 issues still undergoing liquidation was $7.5 million, but the Commissioner's charges of May 3, 2004 stated that as of April 30, 2004, Sentinel had estimated the total negative at $7.25 million (Ex. 1, ¶ 1(a), p. 2, *Ex. A,* ¶ 17, p. 6). The Commissioner viewed this *asset* held by Sentinel in its fiduciary capacity as a *liability* of Sentinel in its corporate capacity *(ibid., Ex. A* at Part III, pp. 6-7). Sentinel alleged that the most practical way to collect these assets and zero out the negative balances was to continue pursuing liquidation work through litigations, as had been done successfully in the past on over 50 defaulted issues, with Sentinel recognizing that it would have to pay the remaining deficiency, if any, upon completion of liquidation on all the remaining 13 defaulted accounts **(Ex. 1,** ¶ 17, p. 12).

To offset the booked negatives—partly cash pay-outs and partly compounded monthly charges thereon, Sentinel had earned fees which it had booked as paid of about $2.5 million[21] plus earned added fee entitlements against the 13 remaining overdrafted issues, which it had not yet bothered to enter on the books of about $3.5 million, so that its approximately $6 million in fee entitlements overcame much of the cumulative approximately $7.25 million negative balance **(Ex. 1,** ¶ 17, p. 12), of which more than half was uncollected interest that was an asset of the trust fund, whether collectable or not.

Although the sworn effects of interest-compounding as set out above is a matter of universal knowledge that every court judicial knows, Sentinel filed an affidavit of an expert of unquestionable

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[21]This was alleged to consist of checks actually written to Sentinel for earned fees but not cashed **(Ex. 1,** ¶13, p. 18 ). While the record herein does not show it, a corrective affidavit was filed in the *certiorari* court, and a later sworn filing in the local Court clearly identified this approximately $2.5 million as charges booked—actually entered against the appropriate defaulted issue so that they could be charged, to diminish its cash balance or increase its overdraft, if any (R., 978 *et seq.* at *Ex. A* thereto, R., 997, ¶ 14).

qualifications,[22] Robert V. Whisenant, whose highly factual affidavit proved that Sentinel was not insolvent when the Commissioner seized it, his affidavit furnishing a total factual response to three questions, "*(i)* whether financial reports by recognized accounting firms establish, under generally-accepted accounting standards, that Sentinel had become insolvent, when considered with the factual allegations in the Commissioner's Statement of Charges, *(ii)* the accurate characterization and quantification of certain funds held by and Sentinel Trust Company in relation to its possible insolvency and *(iii)* whether the facts demonstrated any possibility of the existence of an emergency 'threatening serious loss to depositers' at the time the Commissioner seized Sentinel Trust Company." (R., 1073).

Mr. Whisenant explained that the over $7 million in "accounts receiveable" were an **asset** of Sentinel in its fiduciary capacity, and neither an asset nor a liability in its corporate capacity, but that Sentinel had no entitlement to such assets which belonged to the trust funds, along with any profits on the 1½% monthly-compounding interest earnings, upon collection. (R., IX:1074, ¶ 4); he set out the interest-compounding formula and explained that the compounding factor would double the total of receivables due the fund in 47 months, more than triple it in 74 months and more than quadruple it in 94 months (R., IX:1074, ¶ 5) and he vouched for the absolute accuracy of Mr. Bates' methodology in computing the actual total of cash used that was embedded within the overdraft negative totals (R., 1075, ¶ 6), which Bates had computed at $3,167,678 ( R., VIII:993 ¶ 17) of the approximately $7.25 million "Receivables," and thus included over $4 million profit[23] from the compounding, contingent upon collection.

Mr. Whisenant explained in great detail and totally convincingly why it was impossible to assume, from the "Receivables" asset of overdraft balances on the day of seizure, that Sentinel would

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[22]His *vita* includes not only his previous appointment by Tennessee chancery courts, and his many years' experience as a CPA and a Certified Valuation Analyst; he is also president-elect of the Tennessee Association of Certified Public Accountants (R., 1079-1080)

[23]$7,250,000 - $3,167,678 = $4,082,222.

*ever* be indebted for any money because of the uses of such trust funds to carry out its fiduciary collection obligations (R., IX:1075-1076, ¶¶ 7-8) and explained why, with Sentinel receiving moneys monthly from bond issuers and paying out semi-annually (on dates staggered throughout the year) to bondholders, "I perceive no accounting reason to conclude there was any cash flow problem or inadequacy of cash resources as long as the non-defaulted bond-issuers continued timely to their required payments into the trust funds. This is true because bond issuers are required by the bond indentures to pay in each year the amount of money required to be distributed to bondholders, and if any bond issuer fails to do so, this is a default of the issuer, not the trustee." (R., IX:1077)

As to the methodology of Sentinel's (and Mr. Bates') computations, Whisenant said, "The accounts of this methodology in computing and crediting interest entitlement of any funds, and the balance with the computed 1½% monthly compounded overcharge balances, if inaccurate, could be disproven in minutes by the Commissioner's employees from Sentinel's computer records." (R., IX:1077, ¶ 9). The Commissioner never, at any time, tried to disprove the accuracy of these computations and the starting data (from Sentinel pre-seizure records) on which they were based.

In a new affidavit Mr. Bates executed in November, 2004,[24] he set out his computation's result that the "current overdrafts" total in the "accounts receivable" of approximately $7.25 million was only $3,167,178.00 of cash "borrowed," and he gave data and the resulting computations from the Receiver's reports to the Court below that after seizure, the Receiver had recovered the sum certain of $2,116,806.65 that should be credited to the overdrafted balances (R., IX:1118, ¶ 5).

Bates swore, with reference to those and other named bond-issue collections by the receiver that he mentioned, that they totaled about $6,719,179.29, of which "$3,161,665 should have been applied to reduce overdrafts receivable with about $3.6 million becoming available for bondholder distribution. However, based upon admissions by Vivian Lamb in her deposition, a separate account was set up [by the Receiver] at SunTrust Bank to receive funds after May 18th, but I have seen no

[24]This was filed in opposition to the Commissioner's decision to transfer all Sentinel's trust non-defaulted trust accounts, that is, all the profit-generating ones, to other banks.

reports to the Court to indicate the deposits and withdrawals in this account. The reported collections reduced current overdrafts but the funds have not been credited [by the Receiver] to the 'pooled account.' " (R., 1119 ¶ 6).

Bates computed that the total fees the receiving banks would receive in the future from the transfer of Sentinel's business as $7, 212,503.83, of which $2,706344.90 would go to the Bank of Oklahoma and $4,506,148.94 to SunTrust of Georgia which had agreed to accept this business without bidding for it when the Commissioner earlier tried to sell the accounts. (R., IX:1118, ¶ 3).

***Facts re: Administrative Steps—***

After such investigative or examining acts as may have occurred, on May 3, 2004, the Commissioner served charges and a Cease and Desist Order upon David E. Lemke, Esq., of Waller, Lansden, Dortch & Davis, PLLC (hereinafter, "Waller-Lansden"), then Sentinel's leading counsel **(Ex. 1,** *Ex. A* thereto, first page, followed by the Statement of Charges). The Statement of Charges stated it was issued under the authority of T.C.A. §§ 45-1-107(a)(1), (a) (3), and (c) **(Ex. 1,** *Ex. A* thereto, Stmt. Of Chgs., Part I, p. 2),

The Charges then alleged, *inter alia,* that ***(i)*** Sentinel was a trust company subject to regulation by the Commissioner since July 1, 1999, and that the Commissioner had *begun* an examination of it on *June 16, 2003 (Ibid.,* Part II, p. 2, ¶¶ 3-4); that ***(ii)*** in March, 2004, the Department had received a copy of an audit by Sentinel's auditor, Kraft Bros., for the year ending December 31, 2002, saying that Sentinel had fiduciary accounts receivable of around $7.5 million from collection efforts on defaulted bond issues, that Kraft could not determine the existence, amount, or collectability of these receivables, and that Kraft could not determine what liability, *if any,* Sentinel might incur upon ultimate resolution *(Ibid.,* Part II, pp. 3-4, ¶ 10); that ***(iii)*** the Department had sent a letter to Sentinel on April 5, 2004, requesting a legal opinion on Sentinel's funding collection work on overdrawn defaulted issues from the pooled fund of all bond issues *(Ibid.,* Part II, pp. 4-5, ¶ 13); and that ***(iv)*** this led to a meeting requested by Sentinel's counsel,

Waller-Lansden, at which Waller-Lansden attorneys admitted that the method of paying legal expenses to fund Sentinel's required collateral-liquidation work was "inappropriate," *(Ibid.,* Part II, p. 5, ¶ 14), but asked if Sentinel could continue paying fiduciary expenses that way, anyway, which request the Commissioner declined to approve *(Ibid.,* Part II, pp. 5-6, ¶ 15).(There was no finding that Waller-Lansden attorneys represented that they were authorized by Sentinel to make admissions against its legal interest.) This was followed by charges summarized below, as repeated in the Cease and Desist Order.

The Statement of Charges did not contain any allegations that Sentinel's condition was such as to endanger the interests of its "depositors," which it could not have alleged, because a trust company does not have depositors.

The Statement of Charges informed Sentinel that an Emergency Cease and Desist Order was being issued simultaneously and ordered Sentinel to file an answer within 30 days or else the Emergency Order would become Final *(Ibid.,* Part V, pp. 7-8).

Sentinel filed a timely Special Appearance , Statement of Special Defenses, and Answer with the Commissioner **(Ex. 1,** *Exh. H* thereto), with detailed statutory, constitutional and factual assertions of reasons why the Commissioner lacked the authority he claimed and as to allegations of Sentinel's conduct. It specifically denied that the Commissioner was empowered by statute to exercise **any** of these powers against a trust company, as distinguished from a state bank. *(Ibid., Exh. H,* pp. 1-6).[25]

The Cease and Desist order issued May 3, 2004 **(Ex. 1,** *Ex. B* thereto) charged, primarily, that Sentinel was operating in "an unsafe and unsound manner by using the pooled fiduciary funds to provide operating capital for non-related defaulted bond issues" *(Ibid.,* p. 5, ¶ 1), creating a

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[25]Such Statements of Charges and Cease and Desist Orders, where authorized, are the only types of acts by the commissioner as to which administrative hearings may be instigated by him; all others are reviewable only by *certiorari.* T.C.A. §§ 45-1-107(c) and 45-1-108 (a).

shortfall of $7.25 million as of April 30, 2004, an amount greatly exceeding its operating capital. Without finding that there was any endangerment to "depositors," or even that Sentinel was eminently insolvent so as to jeopardize the interests of its clients and creditors, the instrument then Ordered Sentinel to cease and desist from "using the pooled fiduciary funds to provide operating capital for non-related bond issues" and that it likewise cease from doing a large number of other acts[26] without the Commissioner's prior written approval.

In addition to these prohibitions, it then made mandatory order that Sentinel, its directors, officers and employees "take [listed] affirmative actions:". These included the ordered infusion of $2,000,000.00 additional capital within 2 weeks, and submitting to him within 2 weeks a plan to "completely replenish the fiduciary pooled" deposit account and at the same time outline steps it would take "to provide sufficient operating capital (as determined by the Commissioner)." *(Ibid.,* pp. 7-8, ¶¶ 1-2), and to provide a spread sheet with quantities of information on all trust accounts by the next day *(Ibid.,* p. 8, ¶ 3).

The Commissioner seized Sentinel, utilizing armed officers, on May 18, 2004 **(Ex. 1,** ¶ 1(c), p. 2, issuing brief notices giving the primary stated reason to be its failure to infuse capital as mandatorily ordered on May 3, 2004 (R., I: 3, ¶ 3). The more detailed order simultaneously entered appointed as a receiver both a corporation and its president and ordered that all of Sentinel's named officers are "prohibited and enjoined from the transaction of further business of STC; . . ." and from doing a long list of other acts the Commissioner enjoined, **(Ex. 1,** *Ex. C* thereto, pp. 3-4, ¶ D).

# IV.

## SUMMARY OF ARGUMENT

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[26]These included agreeing to sell any corporate assets, to transfer any fiduciary accounts, engaging in any transactions in *any* accounts, either fiduciary or its own, of more than $50,000.00, making any changes in management or any increases in salaries, etc. *(Ibid.,* p. 5, ¶¶ 2-6 and 8).

Because the many basic points of law involving Constituions, Statutes, purported findings, and basic issues of power are so intertwined, the most orderly way to discuss these is to explore the substantive law and to refer back to each appealed question against the understanding so determined, because each of the questions raised on appeal answers itself.

These legal and factual issues include: Did the Commissioner have the power at all to exercise bank-seizure powers over a non-depository trust company? Aside from this, did he withhold action pending his affording a constitutionally-secured prior hearing? Did he meet the statutory requirements for acting destructively without a hearing? Did he make the necessary findings without which he is not even colorably authorized to take such actions? Were the issues he submitted to the Court below within its jurisdiction to resolve? Was there any rational basis for **assuming** that Sentinel's acts were Banking-Act violations, and for treating its **fiduciary assets** as corporate **liabilities?** Is there any possible way to demonstrate that a statute purporting him to take acts against **a state bank,** a phrase with a common and understandable meaning for centuries, empower him to use those same powers against a totally different type of entity, a **trust company,** if the answer is provided by thinking that uses the only legally-approved rationale for answering such a question, the law of statutory construction? In answered right and by law, each must be answered against the Commissioner's destuctive seizure and exercise of powers.

# V.

# ARGUMENT

***Bank Insolvency and Jurisdictional Separation:***

The greatest emergency calling for rapid government action in economic matters is sudden knowledge of the failure of banks, whereby depositors lose all their money. Secrecy is essential until government can bring the emergency under control, so the public will not know of the hazard and make a run on the bank. Every deposit creates the debtor-creditor relation, but if a bank has fiduciary

powers, it, like a trust company, holds not only its own money but other moneys that it holds in trust, and such moneys are the property of trust beneficiaries and not of the financial institution. Hence in the event the financial institution becomes insolvent, such moneys are immune from ownership or right of control by an insolvent fiduciary's receiver or trustee in bankruptcy, *Caplin, Trustee, v. Marine Midland Grace Trust Co.*, 406 U.S. 416, 92 S.Ct. 1678, 32 L.Ed.2d 195 (1972), and *Wagner, Trustee v. Citizens' Bank & Trust Co.*, 122 Tenn. 164, 122 S.W. 245 (1909). *Wagner* expounds and enforces the difference between trust money which the bank does not own and deposited money which the bank does own as debtors of its depositors.

Under these authorities, Sentinel Trust Company, if insolvent and subject to properly-commenced insolvency procedures, would suffer the possible loss of its own moneys held in its separate account at Union Planters National Bank in Hohenwald, which amounted to $147,854.76 upon seizure (R., IX:1089, ¶ 4), but the funds it held in trust were not its property, and were thus immune from the powers of any bankruptcy or insolvency trustee or receiver.

Whenever a bank actually becomes insolvent, depositor losses are inevitable but for the limited FDIC deposit insurance protection. The reason is that it is the business of *every bank* to create and lend money it doesn't actually have: Not only does it lend, over time, the full amount of cash its depositors have on deposit, whose payment ("withdrawal") they have the absolute right to demand without prior notice, but the creation of new deposits and the inflow of periodic loan repayments is so steady and reliable that the bank can lend far above the total of its deposits, which added loans will create a much larger inflow of cash, all in amounts much greater than needed to pay out in the form of cash upon the presentation of checks in the normal daily range.

The protection of depositors' rights is the basis of such emergency bank-seizure laws as here involved. The enacted statutory scheme governing these procedures very carefully vest all real powers of decision in the Commissioner of Financial Institutions, and shield him from judicial interference by empowering him to make the most important decisions solely on his own authority—to seize, to appoint a receiver, to decide to liquidate.

Whenever the Commissioner exercises his seizure and liquidating powers over a **state bank,** he is empowered to exercise most such powers on his own statutory authority and at his own peril, without any pre-condition of obtaining judicial approval, including the power to possess the **state bank** by making findings and posting his notice (of which a copy must be filed with the Clerk and Master in that county), by T.C.A. § 45-2-1502(a) and (b)(1), to exercise all of the **state bank's** powers and functions including hiring and paying the necessary personnel and installing and delegating his powers to a receiver, by T.C.A. § 45-2-1502(b)(2), to promptly transfer its fiduciary positions ( in the event of liquidation, *if* the **state bank** has fiduciary powers) to a qualified successor by T.C.A. § 45-2-1504(c), to make initial decisions as to validity of claims owed by the **state bank** to creditors, depositors, and other claimants by T.C.A. § 45-2-1504(f), to make disbursements upon approved claims by T.C.A. § 45-2-1504(g) in accordance with priorities established by T.C.A. § 45-2-1504(h), and to pay remaining moneys in accordance with the anti-escheat statutes under T.C.A. § 45-2-1504(j) after distributing to all of the **state bank's** stockholders the amounts of their respective interests under T.C.A. § 45-2-1504(i). No statute requires the approval of any court for any of these actions.

The sole power given the local Court (with which the Commissioner must file a copy of his notice of seizure, T.C.A. § 45-2-1502(a) is to give or withhold approval of specific decisions made by the Commissioner, and the statutes make no provision for any litigation to be commenced or to occur in this regard. The narrow decisions the Court is empowered to approve are:

(i) The power to give *ex parte* approval for the Commissioner to borrow money from the F.D.I.C. to finance the costs of his receivership and management work, by T.C.A. § 45-2-1502(c)(2);

(ii) The power to give or withhold approval of the Commissioner's decisions to sell part of the bank's property worth over $500.00, to compromise any claim against the bank for more than $500.00, and to make advance payment of any particular claim against the bank, under T.C.A. § 45-2-1504(a)(1)–(3);

*(iii)* The power to grant the Commissioner an extension beyond the 6-month statutory period allowed for him to rule upon the validity of claims by T.C.A. § 45-2-1504(f),

*(iv)* After the Commissioner has filed with the Court a schedule of his rulings upon

claims filed against the bank, the power to fix the time for hearings, hold such hearings, and rule upon any exceptions filed to the denial of claims, by T.C.A. § 45-2-1504(g), and

*(v)* To rule upon the final accounting submitted by the Commissioner with the Court as authorized by T.C.A. § 45-2-1504(k).

These defined powers mark the full scope of the jurisdiction given to the local court created by this statute and they do not ordain or imply the existence of any *litigation,* as such, in that court. In Tennessee, it is the law that when a court is empowered by statute to grant only specific and limited relief under stated conditions, it is without jurisdiction to enter orders granting relief in excess of that authorized by statute, so that such orders are void for lack of jurisdiction, even when in the form of a final consent judgment. *City of Bluff City v. Morrell,* 764 S.W.2d 200 (Tenn., 1988); *Brown v. Brown,* 198 Tenn. 600; 281 S.W.2d 492 (1955).

In this case, the Commissioner used the Court below to give the cover of apparent legality to decisions beyond the Court's limited jurisdiction, decisions which were his alone to make in the use of powers granted to him, upon his own responsibility and at his own peril.

He had no right to intrude into the trust funds under the authorities cited above, nor to ask the Court to condone it; his alone was the responsibility to pay his employees and contracting parties under T.C.A. § 45-2-1502(b)(2); if he seized *de facto* the powers and functions of the indenture trustee, these were trustee powers alone in enforcing collateral liquidation on defaulted bond issues, as to which the funds are no part of an insolvent corporate estate, and nothing in these statutes purports to give the local Court authority to condone such decisions that the corporation he seized, Sentinel, had to make by its own judgment and at its own peril. He had no power to enlarge the Court's jurisdiction, which is a legislative power that cannot be exercised by an executive, Tennessee Constitution, Art. II, § 2. And when he exercised the *de facto* power to collect from liquidations on defaulted issues, in the place of the corporation he displaced by his own order and by force, then he was obligated to use the proceeds to make up the negative "account receivable" or overdraft balance in that account, which would automatically include the 1½% monthly interest, compounded monthly to the date of liquidation of the account's assets. The statute gave him no standing to serve as trustee

nor to call upon the Court to sanction his acts, without even having figures of the precise amounts, if any, he credited back to the pooled trust funds to which those remedial deficiency all recoveries belonged.

This jurisdictional separation into decision-making, and approval/disapproval of narrowly-defined decisions is made more clear by considering the statutory methodology of administering **bank** insolvency, the issue addressed by the statutes under which the Commissioner claimed to act.

***Insolvent Bank Administration:***

When a bank becomes insolvent, its giant pool of funds are the money borrowed from its depositors, mingled with all its moneys from other sources which must be kept separate for the orderly administration of claims. If Sentinel were a bank—and if any bank were insolvent—and had its own funds held in another financial institution, subject to no liens, such moneys, as the $147,854.76 that Sentinel had in its corporate account at Union Planters, would be its money, subject to be used by the Commissioner to pay his receiver and his and its employees in administering the receivership, as authorized by T.C.A. § 45-2-1502(f) as "necessary and reasonable expenses of the commissioner's possession of a state bank and of its reorganization or liquidation [which] shall be defrayed from the assets thereof."

When these are exhausted, the Commissioner is free to use his departmental money, which is not a part of the state treasury, or ask court approval to borrow from a Federal Reserve Bank, as provided by T.C.A. § 45-2-1502(c)(2) (referenced *supra,* p. 21, ¶ *(i).* He is free to "borrow" from Departmental funds because these result from "assessments" he collects from each branch bank to a maximum of $5,000.00 annually, the unused portion of which is refundable to those banks, T.C.A. § 45-1-118(c) and (d)(2). But the statute requires that after all claims are filed, these borrowings by the Commissioner from Departmental funds or from a Federal Reserve Bank loan shall *then* be repaid to the Commissioner as having first priority ahead of all other creditors, including depositors, T.C.A. § 45-2-1504(h)(1)(A).

Even the Commissioner's pretense that Sentinel violated his Cease and Desist Order represents his disregard for law, because such orders are negative, as in a restraining order, not mandatory, as in a mandatory injunction. No statute empowers him to affirmatively order a trust company to infuse additional capital. He is not even empowered to order a **bank** to do this. See T.C.A. § 45-1-107(e). Nor is he empowered to order a trust company to abandon practices that may arguably be breaches of trust, because the enforcement of such breaches is for the courts, and the substantive laws on this subject are not within the Commissioner's enforcement powers. These Title 35 provisions governing fiduciary breaches are committed to the enforcement of the chancery courts, and particularly T.C.A. § 35-3-117(j)(1), which caps liability at the maximum of payments missed by trust beneficiaries who were entitled thereto, and Sentinel's "borrowing" practices did not cause a single bondholder to miss a single interest payment.

Careful consideration of the explicit powers given the Commissioner and the local Court make it clear that the Court's orders beyond the statutory grant are void and can furnish no legitimation when the Commissioner acts beyond his statutory powers.

***Statutory Construction Consideration—Commissioner's Powers over a Trust Company:***

Some of the main rules of statutory construction were recently re-stated by the Supreme Court in *Wilkins v. The Kellogg Company,* 48 S.W.3d 148 (Tenn., 2001), which included the following comments:

"[The] premise [that a statute be construed favorably to employees doesn't warrant a court's 'amendment, alteration or extension of its provisions beyond its obvious meaning'] is simply a specific application of the most basic rule of statutory construction: **courts must attempt to give effect to the legislative purpose and intent of a statute, as determined by the ordinary meaning of its text, rather than seek to alter or amend it."** (48 S.W.3d at 152; emphasis added). This prohibits judicial amendment of a statute by changing "bank" to mean "bank or trust company," and equally prohibits drawing legislative intent from other than the body of the statute, absent clear

ambiguity. Repeated statements that the Commissioner is empowered to do destructive acts to **state banks** furnish no basis for *de facto* judicial amendment adding trust companies to that term, especially when the statute elsewhere defines the word "bank" as including "trust company" for some sections but for none other.

**"In attempting to accomplish this goal [of statutory construction], courts must keep in mind that the 'legislature is presumed to use each word in a statute deliberately, and that the use of each word conveys some intent and has a specific meaning and purpose.'** *Bryant v. Genco Stamping & Mfg. Co., 33 S.W.3d 761, 765 (Tenn. 2000).* 'Consequently, where the legislature includes particular language in one section of the statute but omits it in another section of the same act, it is presumed that the legislature acted purposefully in including or excluding that particular subject.' Id." *(Ibid,;* emphasis added). So when the Legislature says the Commissioner's powers over **trust companies** should include the one specified power of examination **for a limited and defined 3-year period,** it is rationally impermissible to conclude that this expresses a grant not only of the examining power, but of **all other** banking-related powers to be freely exercised over trust companies.

In addition to these rules of construction summarized by the Supreme Court, when there is an amendatory statute, as here, the "mischief rule" applies, authorizing construction, where needed, to suppress the mischief and give effect to the remedy the legislation sought to make available. With the rule that all words must be given their normal meaning, the Legislature is given notice that if it wants to enact something, it must choose the appropriate words, and not leave the meaning of the enactment to the power-enlarging imagination of some executive. The well-known canons of construction require that the reader be literate and that the reader must allow and compel the words enacted to actually enter his thinking process and must use common sense, respecting the fact that words in a single instrument must be given uniform meaning.

The long and short of it is that if the Legislature wanted to create new powers over trust companies, it must use the words "trust company" in relation to any particular grant of power. The

*stare decisis* determination of this point was made by *Madison Loan & Thrift Co. v. Neff,* 648 S.W.2d 655 (Tenn.App., M.S., 1982). Defendant Commissioner's self-serving assumption that emergency bank liquidation powers must be given to him to exercise over trust companies as well is belied by the words of the legislation: If this had **any** rational basis, the Legislature would not have enacted that Defendant Commissioner is empowered to exercise his bank-examining powers over every new trust company newly coming under his authority for a limited period of only three years, from July 1, 1999 through June 30, 2002. This would be totally pointless and absurd if the Commissioner were empowered to exercise perpetually over every trust company each power he is empowered to exercise over every state bank. The Commissioner is bound to honor every statute he is sworn to uphold.

Previously, when the Legislature wanted to empower the Commissioner to exercise bank-seizure powers over other types of entities, it amended T.C.A. § 45-1-103(3) to enlarge the definition of a bank ("any person . . . doing a banking business"[27]) by adding that for the purposes of "supervision, examination, and liquidation" the word "bank" also includes "industrial investment companies and industrial banks . . ." The Legislature surely knew it could insert at that point the words "trust companies" as included in the word "bank" but the Legislature did not do so. It surely knew it could provide express language defining "bank" as including "trust company" as it has done in T.C.A. § 45-2-1001(c)(1) "for the purposes of this section and §§ 45-2-1002–45-2-1006".

The Legislature elected not to insert such phraseology to *drastically change and enlarge* the powers of the Commissioner over *every trust company,* both those under his authority since 1980 and those newly subjected to his authority by the 1999 Act. No court is empowered to amend this legislation by inserting words that would make it mean what the Commissioner wishes it meant. But the Legislature did look at one of those listed powers, that of "examination" and deliberately enacted that the Commissioner can exercise that power over trust companies for only a limited 3-year period.

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[27]This doesn't include trust company, which does not and can not accept deposits, and no checks can be drawn against the moneys it holds in trust.

**This grant of power had expired** before this Commissioner did his final "examination."

But there is another aspect of statutory construction, in that the Legislature **did** consider and enact a special provision relating alone to trust companies, not banks, whether those trust companies newly came under his general policing authority in 1999 or had already been subject to his charter-approval and regulatory authority since 1980.

This is in regard to ending corporate existence or selling all corporate assets, and the Tennessee Banking Act has long empowered the Commissioner to seize an insolvent bank, and has prescribed with great particularity how he shall do it and the scope of his powers, T.C.A. §§ 45-1-107, 45-2-1502, and 45-2-1504, with the terminal provision that when all the liquidating and accounting have been achieved, the bank's "charter shall be cancelled." T.C.A. § 45-2-1504(k).

But to back up, aside from *quo warranto* and administrative forfeiture of a corporate charter for failure to file required reports, the general corporate laws provide for surrender of a corporate charter and the corporation's dissolution upon a filing approved by a majority of the corporation's *stockholders.* The 1999 Amendment[28] provides that it amends these two chapters of T.C.A., thereby subjecting it to the entire Code's basic rule for construction, which says: "If provisions of different titles or chapters of the code appear to contravene each other, *the provisions of each title or chapter shall prevail as to all matters and questions growing out of the subject matter of that title or chapter."* T.C.A. § 1-3-103 (emphasis added).

This says in the plainest possible language that the general statute on corporations governs the termination of corporate existence and the sale of all the corporation's assets, except where other provisions specifically provide different methods in special cases, *e.g.,* administrative charter forfeiture, *quo warranto,* and the termination of a banking corporation's existence by operation of

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[28]Of which the Attorney-General has provided the Court both a copy and the full legislative history, which pretty much revealed the legislative thinking that whatever this bill provides, it was written by the Department of Financial Institutions, and is what they want. So much for the *actual* legislative intent.

law under T.C.A. § 45-2-1504(k). The searcher is led to these different parts of the code, but they say nothing different about involuntarily ending a trust company's existence or divesting it of its assets by seizure.

But that subject was taken up **by the 1999 Act** as the appropriate way to divest an insolvent trust company of its properties and business under the Commissioner's official oversight and without its stockholders' consent. That provision is codified as T.C.A. § 45-2-1021.

This codification incorporates part of Chapter 112, § 10, Public Acts of 1999. It empowers a trust company's board of directors to vote to sell all of the corporation's assets "without shareholder approval . . .", T.C.A. § 45-2-1021(a), but permits this result **only** with the Commissioner's approval, and it requires the Commissioner make specific findings to authorize such liquidation.[29] This is followed by provisions of T.C.A. 45-2-1021(b) of precise requirements of such final asset sale.[30] This was the Legislature's enactment, and its *only* enactment dealing with the problem of possible trust company insolvency.

If the legislature wanted to grant to the commissioner the power to exercise these sweeping

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[29]The required findings by the Commissioner for dissolution by the Board without stockholder approval are:
"(1) Interests of the state trust company's clients and creditors are jeopardized because of insolvency or imminent insolvency of the state trust company; and

"(2) Sale is in the best interest of the state trust company's clients and creditors."
T.C.A. § 45-2-1021(a)(1) and (2)

[30]"(b) A sale under this section must include an assumption and promise by the buyer to pay or otherwise discharge:

"(1) All of the state trust company's liabilities to clients;
"(2) All of the state trust company's liabilities for salaries of the state trust company's employees incurred before the date of the sale;

"(3) Obligations incurred by the commissioner arising out of the supervision or sale of the state trust company; and

"(4) Fees and assessments due the department."

and destructive bank-liquidation powers over a trust company, which holds no deposits as its own property, but only funds in trust for others, the Legislature was obligated to so enact. Absent the enactment, the Commissioner has no power to insert additional words into the enactment, nor does any Court.

This destructive power, whose creation **in some form** is essential for control of the banking business, because the business is essentially one of a private company creating an equivalent to currency from money that does not exist, and when credit becomes tight and many of a bank's creditors cannot pay their notes or instalment payments, this has repeatedly led to a lack of public confidence, causing a "run" on banks and loss of depositors' money.

But to apply these powers in such a precipitous and dictatorial manner to a trust company which had already successfully managed the recovery from insolvency of over 60 bond issuers whose bonds went into default, is not defensible. The law does not authorize it and no court should judicially legislate to support the Commissioner's usurpation of powers never granted to him.

Finally, the rule of *expressio unius* plainly applies. For the enforcement of all the banking laws against banks and trust companies as well, the statute points the Commissioner to the Davidson County Chancery Court's remedial powers, in whatever part of the state the bank, trust company, or other financial institution may be situated, T.C.A. § 45-2-107(a)(6), and provides an exception of direct, sudden, and forcible action against banks approaching failure, proving there are no other exceptions. It conditions this exceptional power on threatened harm to **depositors,** but in the alternative mode of terminating a trust company's accounts without consent of their stockholders, it points only to the interests of the trust company's clients and creditors being jeopardized, T.C.A. § 45-2-1021(a)

It would be senseless to grant such sweeping business-seizure powers to be used against trust companies when they **must** be granted over banks, because banks keep so little cash in relation

to their deposits. This is controlled by federal law,[31] which requires a minimum percentage of cash "reserves," partly in "vault cash" but mostly deposited in a Federal Reserve Bank, as a credit that can immediately be converted into cash to meet every demand that can be reasonably foreseen. The maintenance of this reserve is a mandatory requirement imposed upon every federally-insured bank 12 U.S.C. § 461(b)(2) (that is, in practical effect, every bank).

But there is *no statutory requirement,* either federal or state, that a trust company have *any* such reserve, there is no need for such a requirement. The reason there is no legal requirement for a cash reserve imposed upon trust companies, as distinguished from banks, is that the huge sums of money are held in trust, are not money of the corporate trustee, and form no part of the equation for determining if insolvency (the inability to pay debts as they accrue in the normal course of business) has occurred. So long as a bond-indenture trust company can borrow enough money occasionally to meet its operating expenses (payroll, supplies, utilities), it will never have to pay out trust money except to its beneficiaries from money monthly or semi-annually remitted from bond-issuers.

With Sentinel, by the sworn allegations, paying out over $100 million a year to bondholders, this does not represent any obligation upon Sentinel to pay out even as much as 1¢ of its own money. If a bond issuer on any issue should withhold paying the required monthly or semi-annual amounts into trust, Sentinel would just properly withhold paying the semi-annual interest instalments to bondholders, declare the issue in default, and commence liquidation proceedings against the collateral. When the negative balances of trust fund overdrafts in Sentinel's bond-issuer accounts were at its highest level, at any point when its own earned moneys were in a high cash amount, its directors could have declared a dividend for the rest of Sentinel's non-committed money, and could have sold its trust business, with or without Sentinel's corporate properties. Each month fees from its bond issues produced income for monthly operations and required little or no liquid capital. After all, millions of dollars were received and disbursed each month, averaging about $8⅓ million dollars

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[31]These Federal statutes are cited and their provisions are described in detail, **Ex. 1,** ¶ 3, p. 3.

a month, so there was a lot of cash to assure liquidity to fulfill current trust obligations. These were the obligations of the bond-issuers to transmit to Sentinel the monthly or semi-annual payments required by their bond indentures.

If the reserve requirements that are essential for every bank were imposed upon Sentinel, with its $100 million or more in transactions every year, it would have had to keep a cash reserve of $9,750,000 (see **Ex. 1,** ¶ 3, p. 3, and federal statutory citations therein). This would be absurd and arbitrary. This would mean that Sentinel would have to deposit it in a bank or banks so the banks could enrich themselves by earning high interest rates while paying its depositor the customary low interest rate of around 1%± per annum.. It is an accepted principle of statutory construction in Tennessee law: "It is presumed that the Legislature in enacting [any] statute did not intend an absurdity, and such a result will be avoided if the terms of the statute admit of it by *a reasonable construction.*" *Epstein v. State,* 211 Tenn. 633, 641, 366 S.W.2d 914, 918 (1963).

The lack of need and lack of hazard are demonstrated by the Whisenant affidavit (summarized *supra,* pp. 14-15), and by the fact that Sentinel had a years-long history of overcoming the negative overdraft balances in liquidating all but 13 of the 63 defaulted bond issues. To reach the construction the Commissioner **assumed,** without foundation, is to disregard the law of statutory construction. If that law be applied, it cannot be concluded that "bank" doesn't mean "bank," and that powers the Commissioner is authorized to exercise only over banks, he may also exercise over non-banks not subject to the hazards of banking.

Plainly, the Tennessee Banking Act uses the clearest language to empower the Commissioner to seize an insolvent **bank,** T.C.A. § 45-2-1502(b)(2), with no mention of seizing a trust company, to liquidate an insolvent **bank,** T.C.A. § 45-2-1504, with no mention of liquidating a trust company, to remove from office individual directors of a **bank,** T.C.A. § 45-1-107(b) on specific and narrow

grounds,[32] with no mention of powers to remove a trust company's directors. The legislative text contains no explicit grant of such powers to the Commissioner over trust companies. Yet there are numerous provisions of the Tennessee Banking Act that apply directly to trust companies by their own terms, others that apply to banks by their own terms, others that apply to the Commissioner, giving him some powers over named types of entities but not over other types, and the list goes on and on.

Every legislative act is required to be construed as a whole, not by a glance at a single isolated provision, every legislative grant to an official of specific powers over otherwise free people or companies is required to be construed **against** broadening those powers beyond the specific statutory language, *Gallagher v. Butler,* 214 Tenn. 129, 140, 378 S.W.2d 161 (1964), are to be construed with common sense, *Arinki v. State,* 168 Tenn. 393 (1934), and each word (and the omission of related words) is to be given its rational effect, *Tidwell v. Servomation-Willoughby Co.,* 483 S.W.2d 98 (Tenn., 1972), *Reynolds Tobacco Co. v. Carson,* 187 Tenn. 157, 164, 213 S.W.2d 15 (1948)..

There is only one reason for accepting the distorted "construction" that Defendant Commissioner desires: To save him the embarrassment of having abused the trust placed in him by the appointing power by seizing powers not even arguably vested in him if the statute is construed in accordance with the applicable body of law, the law of statutory construction.

The foregoing general discussion of the points of law furnishes the correct answers to the specific questions raised on appeal, each of which Appellants now consider briefly.

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[32]This statute empowers him to remove a *bank* director "who becomes ineligible to hold such position or who, after receipt of an order to cease under subsection (a), violates the provisions of this title or a lawful regulation or order issued thereunder, or who is dishonest." There was no showing or finding that any of Sentinel's directors did any of these three things.

***The Specific Questions on Appeal:***

**Question No. 1:** Whether the proceedings in the chancery court regarding Sentinel Trust Company (a trust company acting primarily as indenture bond trustee under over two hundred bond-indentures) were within its jurisdiction in light of all applicable constitutional (both Tennessee and U. S.) and statutory provisions cited herein, when—

*i)* The law purporting to empower the Commissioner of Financial Institutions (hereinafter, Commissioner) to seize a financial institution, impose receivership thereon, remove corporate directors, take over the operation of the institution's business, and invoke chancery jurisdiction for limited purposes therein stated (hereinafter collectively referred to as "seizure powers") does not provide that such powers and jurisdiction may be exercised over trust companies, but only banks having **depositors** and other specifically-named types of institutions,

*(ii)* even if seizure were conditionally authorized *(e.g.,* were authorized for exercise against a non-depository trust company without banking powers), no due-process hearing upon charges was afforded Sentinel Trust Company prior to the seizure of its properties, the statute under which the Commissioner claimed to act did not empower him to so seize an institution without prior hearing except where necessary to protect the interests of depositors, and Sentinel, as all non-bank trust companies, had never had authority to accept deposits nor ever had any depositors,

*(iii)* the Commissioner's factual claim that Sentinel had become insolvent was false, both as a matter of universal knowledge and as shown by affidavit, by his rationale that Sentinel's **assets *held in its fiduciary capacity*** constituted **liabilities** and by his disregard of the multiplying effect of monthly interest compounding on such assets to be held, to the extent collected, for the benefit of trust funds, *e.g.,* for the benefit of the bond-issuers,

*(iv)* the Commissioner's claim of seizure activity powers over a non-bank trust company because of actions pretended by him to be breaches of Sentinel's fiduciary obligations is without legal foundation, because the enforcement of such obligations is solely a judicial power and not within the Commissioner's statutory authority, not only for a trust company, but even for a *bank in its exercise of fiduciary powers,* over which charged breaches the Tennessee Banking Act gives him no authority;

*(v)* the powers claimed and *de facto* exercised by the Commissioner not being authorized by the plain language of the statutory provisions he invoked, it is not possible, by actually following the Tennessee law of statutory construction, to construe the statutes invoked by the Commissioner to empower him to exercise bank seizure powers over a non-bank and non-depository trust company.

The first absolute in Federal due process jurisprudence is that a state cannot seize private property without a prior meaningful hearing on the merits to determine that it is empowered to so take the property, *Wolff v. McDonnell,* 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974), *Grannis v. Ordean,* 234 U.S. 385, 34 S. Ct. 779, 58 L. Ed. 1363 (1914), *Armstrong v. Manzo,* 380 U.S. 545, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965).

In this case, the Commissioner plainly seized Sentinel without any prior evidentiary hearing upon previously-framed issues, but only a confrontation at which the Commissioner demanded actions according to the "law" he laid down. The Supreme Court has recognized that in spur-of-the-moment types of actions, as by a police officer or prison guard whose superiors cannot possibly know in advance what his actions will be, or in great emergencies, it must suffice if a post-action due process hearing is provided reasonably soon after the fact, *Mathews v. Eldridge,* 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), *Armstrong v. Manzo,* 380 U.S. 545, 552, 85 S. Ct. 1187, 1191, 14 L. Ed. 2d 62, 66 (1965), as distinguished from more deliberate, formal, and planned state action, which must be based upon the record of a *prior* hearing. *Wolff v. McDonald,* 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974).

Here, the law specifically empowers the Commissioner to act after grounds for bank-seizure have been established, T.C.A. § 45-2-1502(a),[33] but not without a prior hearing. But the Legislature has provided a specific and narrow exception—adequate to pass *federal* constitutional muster—for the Commissioner to seize a **state bank** without a hearing: He is so empowered whenever he

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[33] "The commissioner may take possession of *a state bank* if, *after a hearing,* the commissioner finds:

"(1) Its capital is impaired or it is otherwise in an unsound condition;

"(2) Its business is being conducted in an unlawful or unsound manner;

"(3) It is unable to continue normal operations; or

"(4) Its examination has been obstructed or impeded."

(Emphases added)

concludes that "an emergency exists which *will result in serious losses* ***to the depositors,*** the commissioner may take possession of a state bank without a prior hearing." T.C.A. § 45-2-1502(c) (emphases added).

But this exception cannot apply to what the Commissioner described as a non-deposit institution **(Ex. 1,** *Ex. G* thereto), which has no depositors and has never had a depositor. This is a studied and reasonable pre-condition to the exercise of power which is plainly justified because of the perilous condition of banks when they fail.

There being no statutory authority, whose pre-conditions are met, for Sentinel's seizure, it simply does not accord with the law of the land, and thereby accord Sentinel due process of law. The concept and *meaning* of due process of law had their origin and meaning at the time of American Independence, hence derived from the common law, in the older phrase prohibiting the taking of one's life, liberty or property but by the law of the land. This older phraseology for due process is written into Tennessee's Constitution (Art. I, § 8 and Article XI, § 16 ). Its very earliest origin was in the 39th Chapter of *Magna Carta,* which an English king was compelled by force of arms to sign the year 1215:

> "39. No freeman shall be arrested, or detained in prison, or deprived of his freehold, or outlawed, or banished, or in any way molested; and we will not set forth against him, nor send against him, unless by the lawful judgment of his peers and *by the law of the land."*
>
> Pound, *The Development of Constitutional Liberty* (Yale Univ. Press, 1957; Emphasis added).

Tennessee adopted the purer and older language rather than the then-modern catch-phrase, but its meaning had remained unchanged since 1215, over a half-millinium before our Declaration was made to the world.

Its meaning was simply that government—legislative, executive and judicial—is obligated to follow the existing law when it forfeits one's life, liberty, or property: The property of Sentinel and of its stockholders, who indirectly owned everything Sentinel owned.

The most widely-recognized authority on the state of English law was Blackstone's

Commentaries published in 1765. He wrote of the *judicial* due process obligation:

> **"The Courts: Due Process of Law.** It were endless to enumerate all the *affirmative* acts of parliament, wherein justice is directed to be done according to the law of the land; and what that law is, every subject knows, or may know, if he pleases; for it depends not upon the arbitrary will of any judge; but is permanent, fixed, and unchangeable, unless by the authority of parliament."[34]

I BLACKSTONE, COMMENTARIES, § 197, pp.*141-*142 (Jones ed., 1915).

Upon incorporation of a second due process clause into the Fourteenth Amendment to bind state governments, this had the core meaning that each state must accord *due process of state law* in inflicting such deprivations, *Dent v. West Virginia,* 129 U.S. 114, 9 S. Ct. 231, 32 L. Ed. 623 (1889); *In re Kemmler,* 136 U.S. 436, 10 S.Ct. 940, 34 L.Ed. 519 (1890); *Twining v. New Jersey,* 211 U.S. 78, 29 S.Ct. 14, 53 L.Ed. 97 (1908). Although the Eleventh Amendment is a formidable barrier to federal judicial enforcement of the Due Process Clause, and although the U. S. Supreme Court has imaginatively expanded the clause's meaning where it appears in both amendments, into highly particularized narrow applications, that Court has never tried to declare its underlying meaning destroyed. Both the Amendment's Due Process Clause and Tennessee's law of the land clause require that government follow the law (perhaps subject to such parts of the common law as the *de minimus* doctrine) in destroying Sentinel's business and property.

This means *all* of Tennessee's relevant law, including its constitutional prohibitions against executives ever exercising judicial power and judges ever legislating by effectively inserting words not enacted or deleting words enacted,[35] because our Law of the Land Clause is a part of the Declaration of Rights, as to which the following effect is given:

> **Sec. 16. Bill of rights to remain inviolate.** — The declaration of rights hereto prefixed is declared to be a part of the Constitution of this State, and shall never be violated

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[34]Such meaning is reflected in holdings of the U. S. Supreme Court, that the words of the Due Process Clauses ". . . come to us from the law of England, from which country our jurisprudence is to a great extent derived, and their requirement was there designed to secure the subject against the arbitrary action of the crown and place him under the protection of the law. They were deemed to be equivalent to 'the law of the land.' " *Dent v. West Virginia,* 129 U.S. 114, 123-124, 9 S. Ct. 231, 234, 32 L. Ed. 623, 626 (1889).

[35]Constitution, Art II, §§ 1 and 2.

on any pretence whatever. And to guard against transgression of the high powers we have delegated, we declare that everything in the bill of rights contained, is excepted out of the General powers of government, and shall forever remain inviolate."

Constitution, Art. XI, § 16

As one long-departed member of the Tennessee Supreme Court wrote, where the Constitutions language is plain, it is not required to be interpreted, but to be obeyed. That such is still the law is demonstrated in the concurring opinion[36] of then-Justice Drowota in *Summers v. Mayor Robert L. Thompson,* 764 S.W.2d 182, 188 (Tenn., 1988 ), with extensive discussion of the necessity of following the Constitutional requirement that neither legislative nor executive departments can in fact intrude upon the powers of the judicial department. The Opinion states, in part:

". . . Moreover, ' "it is essential to the maintenance of republican government that the action of the legislative, judicial, and executive departments should be kept separate and distinct. . . ." ' *Richardson v. Young, 122 Tenn. 471, 492, 125 S.W. 664, 668 (1909).* The tension and play among these powers provide restraint and maintain the limits placed on the government in all its departments to protect the rights and liberties of the citizens and to deter abuses of power. . . .

"When the thirteen colonies declared their independence from Britain in 1776, one of 'the causes which impel[led] them to the separation' was that the King of Great Britain had 'made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries.' Not only had the recent history of the colonies demonstrated that one of the most immediately oppressive and dangerous instruments of repression was a court subject to arbitrary political whims rather than to the dictates of law, but the history of Europe provided glaring examples of the extent to which judicial power could be abused. The Star Chamber and the Inquisition are sufficient for the point. Before a court whose purpose is to achieve a predetermined, unguided and unrestrained objective, no individual can hope to stand and receive a fair hearing. *A court acting in accord with well-defined procedures and pursuant to the authority of a restraining Constitution and the rule of law, independent of the political system for its term of service and its compensation, was considered essential to the success of a constitutional system and to the preservation of fundamental rights.* As this Court stated at the time of the adoption of the Constitution of 1834, "the independence of the judiciary ought to be anxiously preserved unimpaired; not on account of the individuals who may happen to be judges -- they are nothing -- but on account of the security of life, liberty, and property of the citizen." *Fisher's Negroes v. Dabbs, 14 Tenn. 119, 139 (1834).*

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[36]The 3-vote majority did not reject Justice Drowota's reasoning, but simply held that the constitutional issue need not be addressed.

(764 S.W.2d at 188-189; emphasis added)

Unless all of the law—including the law of statutory construction—be followed in judicial decisions in this case, then Sentinel will have been deprived, as it has, of its properties without due process of law, because law does not exist at all except as it is the living force that guides the courts to their decisions.

> **Question No. 2:** Apart from the lack of authority to invoke the chancery court's limited jurisdiction as set out above, whether the chancery court's prior orders finalized by its "final judgments," together with new orders made therein, were legally void for the reason that **even if Sentinel had been a bank,** many such orders were beyond the court's narrowly-defined jurisdiction, as sought to be invoked by the Commissioner, in that, *inter alia,*
>
> (i) The Court was given no authority to approve a giving away of Sentinel's valuable assets, having a reasonable value to it in excess of $4 million, by granting the Commissioner-sought approval of giving Sentinel's profitable trust accounts—funds held in trust by such a company—to SunTrust Company (even if the fiduciary company be insolvent), not being legally within the power of disposition that may be held by a financial institution's receiver, trustee in bankruptcy, or court overseeing such an official;
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> *(ii)* the invoked statutes give the Court no jurisdiction to permit or forbid the transfer of trust assets, whose right to control was given to trust settlors, being bond-indenture issuers, in their exclusive power to remove the trustee and appoint a substitute trustee without cause;
>
> *(iii)* the court's narrow jurisdiction did not include any purported power to remove and appoint substitute bond registrars or bond paying agents, nor to bar the bond-indenture issuers from appointing their own substitute trustees with or without cause, **all of the foregoing because** under Tennessee law, when statutory jurisdiction is given to a court to order only particular remedies under stated circumstances, orders entered by such court going beyond the scope of the remedies authorized are void for lack of jurisdiction.

Every part of this question has been demonstrated to require that it be answered favorably to Sentinel in the preliminary argument *(supra,* pp. 19-32). This can properly lead only to the conclusion that the numerous approvals made by the court below, and not within the subject of the limited statutory-approvals authorized, should be reversed as nullities, removing any legal

impediment to undoing the partial destruction the Department has illegally achieved, subject to its power to undo the changes it wrought.

> **Question No. 3:** Even when exercising statutory power to seize an insolvent bank with fiduciary powers *(i.e.,* with a trust department acting as trustee), whether the Commissioner's statutory duty to "terminate all fiduciary positions" imposed by T.C.A. § 45-2-1504(c ) empowers him to "cherry-pick" by transferring only the bond issues not in default, and retaining the defaulted ones in which costly liquidation collection proceedings are underway by the corporate trustee whose business he has seized, and to transfer such accounts, without requiring a purchase-price, to a bank (a) which did not bid for them and (b) as to which the Commissioner had been employed in an executive capacity before his appointment to the office of Commissioner.

The Commissioner's plain duty, in transferring to other fiduciaries **all** trust accounts of an insolvent **bank,** is obligated to transfer every one of them, both the profitable and those as to which the trustee is still pursuing liquidation obligations. This is confirmed by the requirements of T.C.A. § 45-2-1021(b) (quoted *supra,* p. 28, n. 30), for the Commissioner to oversee transfer of a trust company's business, that **all** accounts must be transferred, and that the transferee must assume **all liabilities** of the trust company. The transfers authorized by the Court below essentially gave away most of Sentinel's valuable business to SunTrust, retaining all burdensome accounts, and the law would not authorize this, even if the entity seized were a bank rather than a trust company.

> **Question No. 4:** Whether the statute under which the Commissioner claimed to act, the Tennessee Banking Act, apart from the foregoing, is unconstitutional on its face, because it attempts to vest in the Commissioner, a member of the Executive Department of Tennessee's government, certain powers which may be vested only in the judiciary, including the judicial power to appoint receivers, the judicial power to remove corporate directors, and the judicial power to bring about the dissolution of a corporation for insolvency, as well as the legislative power to make provisions of the Tennessee Banking Act applicable or inapplicable to non-banking corporations, at his pleasure.

This question is required to be answered negatively by constitutional principles already set out. The real need for emergency action could easily be achieved by empowering the Davidson County Chancery Court to appoint a receiver and enjoin actions *ex parte* upon a complaint by the

Commissioner. With the existing symbiotic relationship between the Department and the banks, who finance its operation and have a right to annual refund of the unused money *(supra,* p. 23), no failed bank, lacking cash due in part to its seizure, can be expected to have attacked this grant of judicial powers to the Executive Department. But as Justice Drowota wrote , when a statute is unconstitutional, "the presumption of constitutionality afforded statutes, *e.g. State ex rel. Maner v. Leech, 588 S.W.2d 534, 540 (Tenn. 1979),* has been **[*199]** rebutted in this case. I am no less aware that precedent would be partially overruled, but 'the fact . . . that an Act has been construed and enforced and passed upon by this Court is not conclusive of its validity and constitutionality, and this question may be raised at any time when the facts and pleadings justify its consideration.' *Gribble v. Wilson, 101 Tenn. 612, 616-617, 49 S.W. 736, 737 (1899).* Furthermore, 'any [other] rule . . . would lead to entanglements and abuses against which the public should be protected as a matter of public policy.' *Driver v. Thompson, 49 Tenn. App. 646, 652, 358 S.W.2d 477, 479 (1962). . . ."* *Summers v. Mayor Robert L. Thompson, supra,* 764 S.W.2d at 198-199.

While an express holding of unconstitutionality may be superfluous in view of the overwhelming lack of any authority for the Commissioner's actions herein, an expression of disapproval and an indication of needed remedial legislation would be constructive and in accord with the best traditions of an independent but restrained judiciary.

## VI.

## CONCLUSION

All approval-decisions and actions as demonstrated to be both illegal and in excess of the Court's limited jurisdiction should be reversed by demonstration of their legal nullity and the case remanded with instructions that any subsequent orders entered contrary to the proper principles should be nullified by the Court below, and that no further orders should be entered beyond the

narrow prescribed limits of that Court's jurisdiction colorably invoked under the Tennessee Banking Act.

Respectfully submitted,

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# Statutory Addendum

*Constitution of Tennessee, Art. I, § 8*

**Sec. 8. No man to be disturbed but by law**

That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land.

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*Constitution of Tennessee, Article XI, § 16*

**Sec. 16. Bill of rights to remain inviolate**

The declaration of rights hereto prefixed is declared to be a part of the Constitution of this State, and shall never be violated on any pretence whatever. And to guard against transgression of the high powers we have delegated, we declare that everything in the bill of rights contained, is excepted out of the General powers of government, and shall forever remain inviolate.

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*T.C.A. § 1-3-103*

**45-1-103. General definitions**

As used in chapters 1 and 2 of this title, unless the context otherwise requires:

(1) "Act as a fiduciary" or "acting as a fiduciary" means to act in the capacity of a fiduciary as defined in § 35-2-102;

(2) "Action," in the sense of a judicial proceeding, includes recoupment, counterclaim, setoff, suit in equity and any other proceedings in which rights are determined;

(3) "Bank" means any person, as hereinafter defined, doing a banking business subject to the laws of this or any other jurisdiction and, for the purposes of supervision, examination and liquidation, includes industrial investment companies and industrial banks authorized by chapter 5 of this title;

(4) "Branch" with respect to a state bank means any place of business separated from the main office of a bank at which deposits are received, or checks paid or money lent;

(5) "Commissioner" means the commissioner of financial institutions;

(6) "Community" means a city, town, or incorporated village in this state, or where not within any of the foregoing, a trade area in this state;

(7) "Company" includes a bank, trust company, corporation, partnership, association, business or other trust, or similar business entity;

(8) "Department" means the department of financial institutions;

(9) "Deposit" means a deposit of money, bonds or other things of value, creating a debtor-creditor relationship;

(10) "Depository institution" means any company included for any purpose within any of the definitions of "insured depository institution" as set forth in *12 U.S.C. § § 1813*(c)(2) and (3);

(11) "Executive officer," when referring to a bank, means any officer designated as such in the bylaws and includes, whether or not so designated, the president, any vice president, the treasurer, the cashier, the comptroller and the secretary, or any officer who performs the duties appropriate to those officers;

(12) "Fiduciary record" means a matter written, transcribed, recorded, received or otherwise in the possession or control of a trust institution, whether in physical or electromagnetic form, that is necessary to preserve information concerning an act or event relevant to an account or a client of a trust institution;

(13) "Foreign bank" means a foreign bank, as defined in the International Banking Act of 1978 § 1(b)(7);

(14) "Good faith" means honesty in fact in the conduct or transaction concerned;

(15) "Home state" means:

(A) With respect to a federally chartered trust institution and a foreign bank, the state in which such institution maintains its principal office; and

(B) With respect to any other trust institution, the state which chartered such institution;

(16) "Home state regulator" means the bank supervisory agency with primary responsibility for chartering and supervising an out-of-state trust institution;

(17) "Item" means any instrument for the payment of money, even though not negotiable, but does not include money;

(18) "New trust office" means a trust office located in a host state which:

(A) Is originally established by the trust institution as a trust office; and

(B) Does not become a trust office of the trust institution as a result of:

(i) The acquisition of another trust institution or trust office of another trust institution; or

(ii) A merger, consolidation, or conversion involving any such trust institution or trust office;

(19) "Office" with respect to a trust institution means the principal office or a trust office, but not a branch;

(20) "Officer," when referring to a bank, means any person designated as such in the bylaws and includes, whether or not so designated, any executive officer, the chair of the board of directors, the chair of the executive committee and any trust officer, assistant vice president, assistant treasurer, assistant cashier, assistant comptroller, assistant trust officer, or any person who performs the duties appropriate to those offices;

(21) "In operation" or "operating" means that:

(A) A charter has been issued to a bank by the United States comptroller of the currency or a certificate of authority has been issued by the commissioner; or

(B) A bank has all appropriate approvals to accept insured deposits from the public;

(22) "Person" means an individual, corporation, firm, trust, estate, partnership, joint venture, or association;

(23) "Principal office" with respect to a:

(A) State trust company means a location registered with the commissioner as the state trust company's home office at which:

(i) The state trust company does business;

(ii) The state trust company keeps its corporate books; and

(iii) At least one (1) executive officer of the state trust company maintains an office; or

(B) Trust institution, other than a state trust company, means its principal place of business in the United States;

(24) "Reason to know" means that, upon the information available, a person of

ordinary intelligence in the particular business, or of the superior intelligence or experience which the person in question may have, would infer that the fact in question exists or that there is such a substantial chance of its existence that, if exercising reasonable care with reference to the matter in question, conduct would be predicated upon the assumption of its possible existence;

(25) "Savings association" means an association as defined and operating under chapter 3 of this title or under the laws of the United States;

(26) "State bank" means any bank chartered by this state;

(27) "State trust company" means a corporation organized or reorganized under the Banking Act, as compiled in this chapter and chapter 2 of this title, whose purposes and powers are limited to fiduciary purposes and powers, including a trust company previously organized under the laws of this state;

(28) "State trust institution" means a trust institution having its principal office in this state;

(29) "Subsidiary corporation" means any corporation, all or part of the stock of which is owned by a bank principally for the purpose of participating in the active management of the business of such corporation as distinguished from the purpose of deriving profit from the appreciation in value of such stock or from dividends paid thereon;

(30) "Terms" when referring to loans means maturities, security for, rates of interest and other charges;

(31) "Trust company" means a state trust company or any other company chartered to act as a fiduciary that is neither a depository institution nor a foreign bank;

(32) "Trust institution" means a depository institution, foreign bank, state bank or trust company authorized to act as a fiduciary;

(33) "Trust office" means an office, other than the principal office, at which a trust institution is authorized by the commissioner to act as a fiduciary; and

(34) "Unauthorized trust activity" means:

(A) A company, other than one identified in chapter 2, part 10 of this title, acting as a fiduciary within this state,

(B) A trust institution acting as a fiduciary in this state at any location that is not its principal office, trust office or branch, or

(C) An out-of-state trust institution acting as a fiduciary in this state in violation of an order issued by the commissioner.

**HISTORY:** Acts 1969, ch. 36, § 1 (1.103); 1973, ch. 294, § § 6, 8; T.C.A., § 45-103; Acts 1983, ch. 274, § 2; 1993, ch. 22, § 1; 1996, ch. 768, § 3; 1999, ch. 112, § 1.

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*T.C.A. § 35-3-117*

**35-3-117. Investment in securities of management investment company or investment trust by bank or trust company -- Fiduciary liability -- Abuse of fiduciary discretion**

(a) [Deleted by 2002 amendment.]

(b) [Deleted by 2002 amendment.]

(c) [Deleted by 2002 amendment.]

(d) [Deleted by 2002 amendment.]

(e) [Deleted by 2002 amendment.]

(f) [Deleted by 2002 amendment.]

(g) [Deleted by 2002 amendment.]

(h) Notwithstanding any other law, a bank or trust company, to the extent it acts at the direction of another person authorized to direct investment of funds held by the bank or trust company, or to the extent that it exercises investment discretion as a fiduciary, custodian, managing agent, or otherwise with respect to the investment and reinvestment of assets that it maintains in its trust department, may invest and reinvest the assets, subject to the standard contained in this section, in the securities of any open-end or closed-end management investment company or investment trust registered under the Investment Company Act of 1940, *15 U.S.C. § § 80a-1* -- 80a-64. The fact that the bank or trust company, or any affiliate of the bank or trust company, is providing services to the investment company or trust as investment advisor, sponsor, distributor, custodian, transfer agent, registrar or otherwise, and receiving reasonable remuneration for the services, does not preclude the bank or trust company from investing in the securities of such investment company or trust.

(i) In the absence of express provisions to the contrary in the governing instrument, a fiduciary will not be liable to the beneficiaries or to the trust with respect to a decision regarding the allocation and nature of investments of trust assets unless the court determines that the decision was an abuse of the fiduciary's discretion. A court shall not determine that a fiduciary abused its discretion merely because the court would not have exercised the discretion in the same manner.

(j) If a court determines that a fiduciary has abused its discretion regarding the allocation and nature of investments of trust assets, the remedy is to restore the income and remainder beneficiaries to the positions they would have occupied if the fiduciary had not abused its discretion, according to the following rules:

(1) To the extent that the abuse of discretion has resulted in no distribution to a beneficiary or a distribution that is too small, the court shall require a distribution from the trust to the beneficiary in an amount that the court determines will restore the beneficiary, in whole or in part, to the beneficiary's appropriate position, taking into account all prior distributions to the beneficiary.

(2) To the extent that the abuse of discretion has resulted in a distribution to a beneficiary that is too large, the court shall restore the beneficiaries, the trust, or both, in whole or in part, to their appropriate positions, taking into account all prior distributions, by requiring the fiduciary to withhold an amount from one (1) or more future distributions to the beneficiary who received the distribution that was too large or requiring that beneficiary to return some or all of the distribution to the trust.

(3) To the extent that the court is unable, after applying subdivisions (j)(1) and (j)(2), to restore the beneficiaries, the trust, or both, to the position they would have occupied if the fiduciary had not abused its discretion, the court may require the fiduciary to pay an appropriate amount from its own funds to one (1) or more of the beneficiaries or the trust or both.

(k) Upon a petition by the fiduciary, the court having jurisdiction over the trust or agency account shall determine whether a proposed plan of investment by the fiduciary will result in an abuse of the fiduciary's discretion. If the position describes the proposed plan of investment and contains sufficient information to inform the beneficiaries of the reasons for the proposal, the facts upon which the fiduciary relies, and an explanation of how the income and remainder beneficiaries will be affected by the proposed plan of investment, a beneficiary who challenges the proposed plan of investment has the burden of establishing that it will result in an abuse of discretion.

**HISTORY:** Acts 1951, ch. 125, § § 1-6 (Williams, § § 9596.12-9596.17); Acts 1968, ch. 518, § 1; 1971, ch. 61, § 1; 1974, ch. 634, § 1; T.C.A. (orig. ed.), § § 35-319 -- 35-324; Acts 1989, ch. 288, § 2; 1991, ch. 386, § 1; 2001, ch. 57, § § 1, 2; 2002, ch. 696, § 15.

**NOTES:**

AMENDMENTS. The 2002 amendment deleted subsections (a) through (g) which read: "(a) All trustees, guardians and other fiduciaries in this state (herein collectively called "fiduciary'), unless prohibited by the will, deed, agency agreement or trust instrument (herein collectively called "governing instrument') of the person (herein collectively called "trustor') creating the trust, agency account or other fiduciary relationship, or unless by any such governing instrument another mode of investment is prescribed, may, in addition to other methods of investment authorized by law, invest all funds held in the trust or agency account or for investment as provided in this section.

"(b) When investing, reinvesting, purchasing, acquiring, exchanging, selling and managing property, a fiduciary shall act not in regard to speculation but with the care, skill, prudence and diligence under the circumstances then prevailing, specifically including, but not by way of limitation, the general economic conditions, the anticipated tax consequences of an investment, the anticipated duration of the trust, and the anticipated needs of the trust and its beneficiaries, that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims to attain the goals of the trustor as determined from the governing instrument. Within the foregoing limitations and considering individual investments as part of an overall investment strategy, a fiduciary is authorized to acquire and retain every kind of property (real, personal or mixed, and including life insurance, endowment and annuity contracts) and every kind of investment. The trustor may expand or restrict the standards set forth in this section by express provisions in the governing instrument. Any fiduciary under a governing instrument shall not be liable to anyone whose interests arise from that instrument for the fiduciary's good faith reliance on those express provisions. Any determination of liability for investment performance shall consider the performance of the portfolio as a whole and shall not be confined to the performance of a particular investment.

"(c) In the absence of express provisions to the contrary in the governing instrument, a fiduciary may without liability continue to hold property received into

a trust at its inception or subsequently added to it or acquired pursuant to proper authority if and as long as the fiduciary, in the exercise of good faith and reasonable prudence, discretion and intelligence, may consider that retention is in the best interest of the trust and its beneficiaries or in furtherance of the goals of the trustor as determined from that instrument. Such property may include capital stock in the corporate fiduciary and stock in any corporation controlling, controlled by or under common control with such fiduciary; and the fiduciary may acquire additional shares of such stock by stock dividends, stock splits, exchanges and conversions for other stock or debentures and exercise of rights to acquire stock of the corporation or another corporation acquiring the stock of the corporation by merger, consolidation or reorganization.

"(d) In the absence of express provisions to the contrary in the governing instrument, a deposit of trust funds at interest in any bank, savings and loan association or other financial institution (including the fiduciary and an affiliated depository institution) shall be a qualified investment to the extent that such deposit is insured under any present or future law of the United States. The fiduciary may also hold deposits in such institutions without interest in reasonable amounts and for reasonable times for operating expenses, anticipated distributions and pending investments.

"(e) Nothing in this section abrogates or restricts the power of an appropriate court in proper cases to direct or permit the fiduciary to deviate from the terms of the governing instrument or restrains a fiduciary from taking any action regarding the making or retention of investments.

"(f)(1) The provisions of this section apply to all trusts and agency accounts in existence on July 1, 1989, or thereafter created, and shall apply to all decisions by a fiduciary regarding the allocation and nature of investments of trust assets made with respect to such trusts or agency accounts since their inception.

"(2) "Investments permissible by law for investment of trust funds,' "legal investments,' "authorized investments,' "investments acquired using the judgment and care which men of prudence, discretion and intelligence exercise in the management of their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of their capital,' "Prudent Man Rule,' "Prudent Person Rule' and other words of similar import used in defining the powers of the fiduciary relative to investments, in the absence of other controlling or modifying provisions of the governing instrument, are construed as authorizing any investment permitted, and imposing the standard of prudence required, by the terms of this section."

"(g) The powers granted by this section to trustees, guardians and other fiduciaries shall be in addition to the powers existing under other provisions of this code authorizing investments by fiduciaries. This section shall not apply in any situation governed by the Uniform Veterans' Guardianship Act, compiled in title 34, chapter 5."

EFFECTIVE DATES. Acts 2002, ch. 696, § 18. July 1, 2002.

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*T.C.A. § 45-1-103*

**45-1-103. General definitions**

As used in chapters 1 and 2 of this title, unless the context otherwise requires:

(1) "Act as a fiduciary" or "acting as a fiduciary" means to act in the capacity of a fiduciary as defined in § 35-2-102;

(2) "Action," in the sense of a judicial proceeding, includes recoupment, counterclaim, setoff, suit in equity and any other proceedings in which rights are determined;

(3) "Bank" means any person, as hereinafter defined, doing a banking business subject to the laws of this or any other jurisdiction and, for the purposes of supervision, examination and liquidation, includes industrial investment companies and industrial banks authorized by chapter 5 of this title;

(4) "Branch" with respect to a state bank means any place of business separated from the main office of a bank at which deposits are received, or checks paid or money lent;

(5) "Commissioner" means the commissioner of financial institutions;

(6) "Community" means a city, town, or incorporated village in this state, or where not within any of the foregoing, a trade area in this state;

(7) "Company" includes a bank, trust company, corporation, partnership, association, business or other trust, or similar business entity;

(8) "Department" means the department of financial institutions;

(9) "Deposit" means a deposit of money, bonds or other things of value, creating a debtor-creditor relationship;

(10) "Depository institution" means any company included for any purpose within any of the definitions of "insured depository institution" as set forth in *12 U.S.C. § § 1813*(c)(2) and (3);

(11) "Executive officer," when referring to a bank, means any officer designated as such in the bylaws and includes, whether or not so designated, the president, any vice president, the treasurer, the cashier, the comptroller and the secretary, or any officer who performs the duties appropriate to those officers;

(12) "Fiduciary record" means a matter written, transcribed, recorded, received or otherwise in the possession or control of a trust institution, whether in physical or electromagnetic form, that is necessary to preserve information concerning an act or event relevant to an account or a client of a trust institution;

(13) "Foreign bank" means a foreign bank, as defined in the International Banking Act of 1978 § 1(b)(7);

(14) "Good faith" means honesty in fact in the conduct or transaction concerned;

(15) "Home state" means:

(A) With respect to a federally chartered trust institution and a foreign bank, the state in which such institution maintains its principal office; and

(B) With respect to any other trust institution, the state which chartered such institution;

(16) "Home state regulator" means the bank supervisory agency with primary responsibility for chartering and supervising an out-of-state trust institution;

(17) "Item" means any instrument for the payment of money, even though not negotiable, but does not include money;

(18) "New trust office" means a trust office located in a host state which:

(A) Is originally established by the trust institution as a trust office; and

(B) Does not become a trust office of the trust institution as a result of:

(i) The acquisition of another trust institution or trust office of another trust institution; or

(ii) A merger, consolidation, or conversion involving any such trust institution or trust office;

(19) "Office" with respect to a trust institution means the principal office or a trust office, but not a branch;

(20) "Officer," when referring to a bank, means any person designated as such in the bylaws and includes, whether or not so designated, any executive officer, the chair of the board of directors, the chair of the executive committee and any trust officer, assistant vice president, assistant treasurer, assistant cashier, assistant comptroller, assistant trust officer, or any person who performs the duties appropriate to those offices;

(21) "In operation" or "operating" means that:

(A) A charter has been issued to a bank by the United States comptroller of the currency or a certificate of authority has been issued by the commissioner; or

(B) A bank has all appropriate approvals to accept insured deposits from the public;

(22) "Person" means an individual, corporation, firm, trust, estate, partnership, joint venture, or association;

(23) "Principal office" with respect to a:

(A) State trust company means a location registered with the commissioner as the state trust company's home office at which:

(i) The state trust company does business;

(ii) The state trust company keeps its corporate books; and

(iii) At least one (1) executive officer of the state trust company maintains an office; or

(B) Trust institution, other than a state trust company, means its principal place of business in the United States;

(24) "Reason to know" means that, upon the information available, a person of ordinary intelligence in the particular business, or of the superior intelligence or experience which the person in question may have, would infer that the fact in question exists or that there is such a substantial chance of its existence that, if exercising reasonable care with reference to the matter in question, conduct would be predicated upon the assumption of its possible existence;

(25) "Savings association" means an association as defined and operating under chapter 3 of this title or under the laws of the United States;

(26) "State bank" means any bank chartered by this state;

(27) "State trust company" means a corporation organized or reorganized under the Banking Act, as compiled in this chapter and chapter 2 of this title, whose purposes and powers are limited to fiduciary purposes and powers, including a trust company previously organized under the laws of this state;

(28) "State trust institution" means a trust institution having its principal office in this state;

(29) "Subsidiary corporation" means any corporation, all or part of the stock of which is owned by a bank principally for the purpose of participating in the active management of the business of such corporation as distinguished from the purpose of deriving profit from the appreciation in value of such stock or from dividends paid thereon;

(30) "Terms" when referring to loans means maturities, security for, rates of interest and other charges;

(31) "Trust company" means a state trust company or any other company chartered to act as a fiduciary that is neither a depository institution nor a foreign bank;

(32) "Trust institution" means a depository institution, foreign bank, state bank or trust company authorized to act as a fiduciary;

(33) "Trust office" means an office, other than the principal office, at which a trust institution is authorized by the commissioner to act as a fiduciary; and

(34) "Unauthorized trust activity" means:

(A) A company, other than one identified in chapter 2, part 10 of this title, acting as a fiduciary within this state,

(B) A trust institution acting as a fiduciary in this state at any location that is not its principal office, trust office or branch, or

(C) An out-of-state trust institution acting as a fiduciary in this state in violation of an order issued by the commissioner.

**HISTORY:** Acts 1969, ch. 36, § 1 (1.103); 1973, ch. 294, § § 6, 8; T.C.A., § 45-103; Acts 1983, ch. 274, § 2; 1993, ch. 22, § 1; 1996, ch. 768, § 3; 1999, ch. 112, § 1.

*T.C.A. §§ 45-1-107*

**45-1-107. Powers and duties of commissioner**

(a) In addition to other powers conferred by this title, the commissioner has the power to:

(1) Interpret the provisions of this chapter and chapter 2 of this title, and regulate banking practices thereunder;

(2) Restrict the withdrawal of deposits from all or one (1) or more state banks where the commissioner finds that extraordinary circumstances make such restriction necessary for the proper protection of depositors in the affected institutions;

(3) Authorize a state bank to participate in a public agency hereafter created under the laws of this state or of the United States, the purpose of which is to afford advantages or safeguards to banks or to depositors and to comply with all requirements and conditions imposed upon such participants;

(4) Order any person to cease violating a provision of this title or lawful regulation issued under this title;

(5) Order any person to cease and desist from engaging in any unsafe or unsound banking practice when such practice is likely to cause insolvency or dissipation of assets or earnings of a state bank or is likely to otherwise seriously prejudice the interests of the depositors of a state bank; and

(6) Bring an action in the chancery court of Davidson County to enjoin any act or practice in or from this state which constitutes a violation of any provision of law or any rule or order which the department has the duty to execute pursuant to § 45-1-104. The court may not require the commissioner to post a bond in bringing such an action. Upon a proper showing by the commissioner, the court shall grant a permanent or temporary injunction, restraining order, writ of mandamus, disgorgement, or other proper equitable relief including the recovery by the commissioner of costs and attorney fees. Further, to the extent that this subdivision does not conflict with other provisions of this title, a receiver or conservator may be appointed for the defendant or the defendant's assets.

(b) The commissioner may remove a director, trustee, officer or employee of a state bank who becomes ineligible to hold such position or who, after receipt of an

order to cease under subsection (a), violates the provisions of this title or a lawful regulation or order issued thereunder, or who is dishonest. It is a criminal offense against the state for any such persons, after receipt of a removal order, to perform any duty or exercise any power of any state bank for a period of three (3) years. A removal order shall specify the grounds thereof and a copy of the order shall be sent to the bank concerned.

(c) Notice and opportunity for a hearing shall be provided in advance of any of the foregoing actions in this section taken by the commissioner, except the formulation of regulations of general application. In cases involving extraordinary circumstances requiring immediate action, the commissioner may take such action but shall promptly afford a subsequent hearing upon application to rescind the action taken.

(d) The commissioner may, on petition of any interested person and after hearing, issue a declaratory order with respect to the applicability to any person, property or state of facts under this title or a rule issued by the commissioner. The order shall bind the commissioner and all parties to the proceeding on the state of facts alleged unless it is modified or reversed by a court. A declaratory order may be reviewed and enforced in the same manner as other orders of the commissioner, but the refusal to issue a declaratory order shall not be reviewable.

(e) In addition to other powers conferred by this title, the commissioner has power to require a state bank to:

(1) Maintain its accounts in accordance with such regulations as the commissioner may prescribe having regard to the size of the organization;

(2) Observe methods and standards which the commissioner may prescribe for determining the value of various types of assets;

(3) Charge off the whole or part of an asset which at the time of the commissioner's action could not lawfully be acquired;

(4) Write down an asset to its market value;

(5) Record liens and security in property or at the option of the bank, insure against losses from not recording;

(6) Obtain a financial statement from a prospective borrower to the extent that the bank can do so;

(7) Search, or obtain insurance of, the title to real estate taken as security;

(8) Maintain adequate insurance against such other risks as the commissioner may determine to be necessary and appropriate for the protection of depositors and the public; and

(9) Call a special meeting of the shareholders.

(f) The commissioner has the power to subpoena witnesses, compel their attendance, require the production of evidence, administer an oath and examine any person under oath in connection with any subject relating to duty imposed upon or a power vested in the commissioner. These powers shall be enforced by a court of competent jurisdiction of the county in which the hearing is held.

(g) No person shall be subjected to any civil or criminal liability for any act or omission to act in good faith in reliance upon a subsisting order, regulation or definition of the commissioner, notwithstanding a subsequent decision by a court invalidating the order, regulation or definition.

(h) The commissioner is hereby granted the power to enact reasonable substantive and procedural rules to carry out the purposes of any and all chapters within the commissioner's regulatory authority as conferred by law. This power shall specifically include, but not be limited to, the authority to establish a schedule of fees to be charged by the department relative to notifications or applications to be reviewed by the department. Such promulgation shall be done in conformity with the Uniform Administrative Procedures Act, compiled in title 4, chapter 5.

**HISTORY:** Acts 1969, ch. 36, § 1 (2.012); impl. am. Acts 1971, ch. 137, § 2; Acts 1973, ch. 294, § 12; 1975, ch. 59, § 1; 1978, ch. 516, § 1; T.C.A., § 45-108; Acts 1992, ch. 658, § 1; 1993, ch. 130, § 1; 1994, ch. 551, § 1; 1996, ch. 562, § 2; 2001, ch. 54, § § 1, 2.

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*T.C.A. § 45-1-108*

**45-1-108. Review of commissioner's orders -- Enforcement**

(a) A person who is aggrieved by an order of the commissioner issued pursuant to § 45-1-107 is entitled to judicial review as provided in the Uniform Administrative Procedures Act, compiled in title 4, chapter 5. A person who is aggrieved and directly affected by an order of the commissioner issued pursuant to other provisions of this title may seek judicial review as provided in title 27, chapter 9, except that judicial

review of orders issued pursuant to chapter 5 of this title shall be governed by the Uniform Administrative Procedures Act.

(b) In the event a person does not comply with an order issued pursuant to § 45-1-107, the commissioner may petition a chancery court having jurisdiction to seek injunctive relief to compel compliance with any such order. The power is conferred and the duty is imposed upon the several chancery courts, in all proper cases, to award such injunctive relief; provided, that the order issued by the commissioner shall not be reviewable in a proceeding initiated under this subsection.

(c) In lieu of the procedure set forth in subsection (b), the commissioner may assess a civil penalty of not more than five hundred dollars ($ 500) per day against any bank or other person who violates an order issued pursuant to § 45-1-107 for each day during which such violation has occurred and continues. The maximum aggregate civil penalty assessed against a bank and any other person participating in such violation, however, shall not exceed five hundred dollars ($ 500) per day for each proceeding. In determining the amount of the penalty, the commissioner shall consider the appropriateness of the penalty with respect to the size of the financial resources and good faith of the person charged, the gravity of the violation, and such other matters as justice may require. The person shall be afforded an opportunity for hearing upon request made within ten (10) days of the issuance of the notice of assessment. The commissioner's decision after a hearing or otherwise shall constitute a final order and may be reviewed in accordance with subsection (a); provided, that the original order shall not be reviewable in a proceeding initiated under this subsection.

**HISTORY:** Acts 1973, ch. 294, § 18; T.C.A., § 45-126; Acts 1981, ch. 24, § 1; 1983, ch. 274, § 5.

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*T.C.A. § 45-1-118*

**45-1-118. Charter application costs -- Annual banking fee -- Assessments -- Recovering the costs of examination and supervision**

(a) Each state bank shall pay to the department the cost, as determined by the commissioner, of investigating an application by such bank for a charter as a new bank or for a branch bank.

(b) (1) The commissioner shall determine an annual budget for the department.

(2) The amount of the budget attributable to the regulation and examination of state banks shall thereafter be divided among the state banks by the commissioner.

(c) (1) The assessment against each state bank, which shall be known as the "banking fee," shall be allocated in proportion to the total assets beneficially owned by each state bank; provided, that:

(A) The commissioner may establish a minimum assessment in lieu of any pro rata assessment which shall not exceed five thousand dollars ($ 5,000); and

(B) The maximum assessment shall not exceed the annualized fee which a state bank would pay if it were a national bank of equivalent asset size.

(2) Nondepository trust companies which are regulated by the department shall, in lieu of a banking fee based on asset size, pay to the commissioner, by July 1 of each year, the sum of one thousand dollars ($ 1,000) for each office operated by such trust company. In addition, nondepository trust companies shall pay the actual expenses of examination at the time of examination. Such fees are payable in addition to other fees and taxes now required by law and are expendable receipts for the use of the commissioner in defraying a portion of the cost of administration of this chapter.

(d) (1) Assessments shall be paid into the state treasury upon notice from the commissioner, and all moneys collected by the commissioner shall be used for the administration of the department and for the department's sole use.

(2) Any funds collected by the department but unexpended at the end of a fiscal year shall not revert or in any way be transferred to the general fund but shall be rebated to the state banks, within one hundred eighty (180) days, or shall be credited against the banking fee owed by the state banks for the current fiscal year.

(e) If any state bank fails to make payment within thirty (30) days after notice from the commissioner of the amount of its assessment, the commissioner may issue an execution against its property for an amount equal to one hundred fifty percent (150%) of the delinquent payment.

(f) (1) The department may recover the costs of examination and supervision of a financial institution, subsidiary, or service corporation for supervision or examination which are in addition to the costs associated with the level of supervision ordinarily required for a financial institution in sound financial condition and which are in excess of the normal regulatory fees paid by such institution. The department may also recover the costs of any review of any affiliate of a financial institution

determined by the department to have contributed to an unsafe or unsound practice at a financial institution, subsidiary, or service corporation.

(2) The commissioner may issue orders and promulgate rules and regulations pursuant to the Uniform Administrative Procedures Act, compiled in title 4, chapter 5, for the purpose of establishing and defining costs associated with complying with this subsection and for the purpose of enforcing the recovery of such costs.

(g) (1) The commissioner, in cooperation with the department of personnel, shall on an annual basis conduct a review of the salaries of employees in the department. Such review shall include a comparative analysis of salaries of the departmental employees, employees in similar state positions in bank regulatory agencies of other states, employees in federal regulatory agencies, similar employees in other Tennessee state departments, and employees in similar positions in the private sector. Based on the review or other factors including, but not limited to, staff turnover, qualifications, or availability of qualified employees, the commissioner shall make recommendations for changes in classifications, salary improvements, or both.

(2) The commissioner shall establish, maintain, and review on a periodic basis a method for assessing the staffing needs for the department. The method shall include, but not be limited to, assessment of the statutory requirements of the department, the number and type of institutions regulated within each regulatory category, and the size of the assets under the departmental supervision in each category.

(h) The commissioner, in the commissioner's discretion, may, by regulation, establish the criteria and circumstances by which a credit toward the annual banking fee may be given to a Tennessee state-chartered bank for the annual banking fee assessment, if any, assessed against an out-of-state branch of the Tennessee state-chartered bank by the host state banking supervisory agency.

**HISTORY:** Acts 1969, ch. 36, § 1 (2.110); 1973, ch. 294, § 16; T.C.A., § 45-117; Acts 1988, ch. 655, § 1; 1992, ch. 628, § 1; 1993, ch. 233, § 1; 1995, ch. 451, § § 1, 2; 1996, ch. 562, § 4; 1999, ch. 112, § 2.

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*T.C.A. § 45-2-1021.*

**45-2-1021. Sale of assets**

(a) The board of a state trust company, with the commissioner's approval, may cause a state trust company to sell all or substantially all of its assets, including the right to control accounts established with the trust company, without shareholder approval if the commissioner finds the:

(b) A sale under this section must include an assumption and promise by the buyer to pay or otherwise discharge:

(1) All of the state trust company's liabilities to clients;

(1) Interests of the state trust company's clients and creditors are jeopardized because of insolvency or imminent insolvency of the state trust company; and

(2) Sale is in the best interest of the state trust company's clients and creditors.

(2) All of the state trust company's liabilities for salaries of the state trust company's employees incurred before the date of the sale;

(3) Obligations incurred by the commissioner arising out of the supervision or sale of the state trust company; and

(4) Fees and assessments due the department.

(c) This section does not affect the commissioner's right to take action under another law. The sale by a trust company of all or substantially all of its assets with shareholder approval is considered a voluntary dissolution and liquidation and is governed by § 45-2-1501.

**HISTORY:** Acts 1999, ch. 112, § 10.

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*T.C.A. § 45-2-1502*

**45-2-1502. Commissioner in possession**

(a) The commissioner may take possession of a state bank if, after a hearing, the commissioner finds:

(1) Its capital is impaired or it is otherwise in an unsound condition;

(2) Its business is being conducted in an unlawful or unsound manner;

(3) It is unable to continue normal operations; or

(4) Its examination has been obstructed or impeded.

(b) (1) The commissioner shall take possession by posting upon the premises a notice reciting that the commissioner is assuming possession pursuant to this section and the time, not earlier than the posting of the notice, when such possession shall be deemed to commence. A copy of the notice shall be filed in a court of general or equity jurisdiction in the county in which the institution is located. The commissioner shall notify the federal reserve bank of the district of taking possession of any state bank which is a member of the federal reserve system, and shall notify the Federal Deposit Insurance Corporation of the taking possession of any insured bank.

(2) When the commissioner has taken possession of a state bank, the commissioner shall be vested with the full and exclusive power of management and control, including the power to continue or to discontinue the business, to stop or to limit the payment of its obligations, to employ any necessary assistants, to execute any instrument in the name of the bank, to commence, defend and conduct in its name any action or proceeding in which it may be a party, to terminate the commissioner's possession by restoring the bank to its board of directors, to appoint a receiver to have all of the rights, powers, duties and obligations granted to the commissioner in possession for the purpose of liquidation or reorganization, and to reorganize or liquidate the bank in accordance with § § 45-2-1503 and 45-2-1504. As soon as practicable after taking possession, the commissioner shall make an inventory of the assets and file a copy thereof with the court in which the notice of possession was filed.

(3) When the commissioner has taken possession, there shall be a postponement until six (6) months after the commencement of such possession of the date upon which any period of limitation fixed by a statute or agreement would otherwise expire on a claim or right of action of the bank, or upon which an appeal must be taken or a pleading or other document must be filed by the bank in any pending action or proceeding.

(c) (1) If, in the opinion of the commissioner, an emergency exists which will result in serious losses to the depositors, the commissioner may take possession of a state bank without a prior hearing. Any person aggrieved and directly affected by this action of the commissioner may have a review by certiorari as provided in title 27, chapter 9.

(2) If the commissioner determines to liquidate the state bank, the commissioner shall give such notice of such determination to the directors, stockholders, depositors and known creditors. Upon a determination to liquidate, the commissioner may, with ex parte approval of the court in which the notice of possession was filed, sell all or

any part of the state bank's assets to another state or national bank or to the Federal Deposit Insurance Corporation. The commissioner may also, with ex parte approval of the court, borrow from the Federal Deposit Insurance Corporation any amount necessary to facilitate the assumption of deposit liabilities by a newly chartered or existing bank and may assign any part or all of the assets of the state bank as security for such loan.

(3) If the commissioner determines to reorganize the state bank, after according a hearing to all interested parties, the commissioner shall enter an order proposing a reorganization plan. A copy of the plan shall be sent to each depositor and creditor who will not receive payment of a claim in full under the plan, together with notice that, unless within fifteen (15) days the plan is disapproved in writing by persons holding one third (1/3) or more of the aggregate amount of such claims, the commissioner will proceed to effect the reorganization. A department, agency or political subdivision of this state holding a claim which will not be paid in full is authorized to participate as any other creditor.

(d) No judgment, lien or attachment shall be executed upon any asset of the state bank while it is in the possession of the commissioner. Upon the election of the commissioner in connection with a liquidation or reorganization:

(1) Any lien or attachment, other than an attorney's or mechanic's lien, obtained upon any asset of the state bank during the commissioner's possession or within four (4) months prior to commencement thereof shall be vacated except liens created by the commissioner while in possession; and

(2) Any transfer of an asset of the state bank made after or in contemplation of its insolvency with intent to effect a preference shall be voided.

(e) The commissioner may borrow money in the name of the state bank and may pledge its assets as security for the loan.

(f) All necessary and reasonable expenses of the commissioner's possession of a state bank and of its reorganization or liquidation shall be defrayed from the assets thereof.

**HISTORY:** Acts 1969, ch. 36, § 1 (3.502); 1973, ch. 294, § 6; T.C.A., § 45-902; Acts 1980, ch. 510, § § 2-4; 1999, ch. 112, § 14.

## 45-2-1504. Liquidation by commissioner

(a) In liquidating a state bank, the commissioner may exercise any power of the office of commissioner, but shall not, without the approval of the court in which notice of possession has been filed:

(1) Sell any asset of the organization having a value in excess of five hundred dollars ($ 500);

(2) Compromise or release any claim if the amount of the claim exceeds five hundred dollars ($ 500), exclusive of interest; or

(3) Make any payment on any claim, other than a claim upon an obligation incurred by the commissioner, before preparing and filing a schedule of the commissioner's determinations in accordance with this chapter.

(b) Within six (6) months of the commencement of liquidation, the commissioner may elect to terminate any executory contract under which the state bank has contracted either to receive or to provide services, such services specifically including advertising, or any obligation of the bank as a lessee. A lessor who receives sixty (60) days' notice of the commissioner's election to terminate the lease shall have no claim for rent other than rent accrued to the date of termination or for claims for damages for such termination.

(c) As soon after the commencement of liquidation as is practicable, the commissioner shall take the necessary steps to terminate all fiduciary positions held by the state bank and take such action as may be necessary to surrender all property held by the bank as a fiduciary and to settle its fiduciary accounts. Such fiduciary accounts may be transferred by the commissioner to another qualified corporate fiduciary as determined by the commissioner, and notice of such transfer must be given by registered mail to the parties by the transferee corporate fiduciary.

(d) As soon after the commencement of liquidation as practicable, the commissioner shall send notice of the liquidation to each known depositor, creditor and lessee of a safe deposit box or bailor of property held by the bank at the address shown on the books of the institution. The notice shall also be published in a newspaper of general circulation in the community once a week for three (3) successive weeks. The commissioner shall send with the notice a statement of the amount shown on the books of the institution to be the claim of the depositor or creditor. The notice shall demand that property held by the bank as bailee or in a safe deposit box be withdrawn by the person entitled thereto and that claims of depositors

and creditors, if the amount claimed differs from that stated in the notice to be due, be filed with the commissioner before a specified date not earlier than sixty (60) days thereafter in accordance with the procedure prescribed in the notice.

(e) Safe deposit boxes, the contents of which have not been removed before the date specified, shall be opened by the commissioner in the manner provided for boxes upon which the payment of rental is in default, and the sealed packages containing the contents and the certificates, together with any unclaimed property held by the bank as bailee and certified inventories thereof, shall be reported to the state treasurer who shall deal with them in accordance with the provisions of the Uniform Disposition of Unclaimed Property Act, compiled in title 66, chapter 29.

(f) Within six (6) months after the last day specified in the notice for the filing of claims or such longer period as may be allowed by the court in which notice of possession has been filed, the commissioner shall:

(1) Reject any claim if the commissioner doubts the validity thereof;

(2) Determine the amount, if any, owing to each known creditor or depositor and the priority class of the claim under this chapter and chapter 1 of this title;

(3) Prepare a schedule of the commissioner's determinations for filing in the court in which notice of possession was filed; and

(4) Notify each person whose claim has not been allowed in full and publish once a week for three (3) successive weeks a notice of the time when and the place where the schedule of determinations will be available for inspection and the date, not sooner than thirty (30) days thereafter, when the commissioner will file the schedule in court.

(g) Within twenty (20) days after the filing of the commissioner's schedule, any creditor, depositor or stockholder may file an objection to any determination made. Any objections so filed shall be heard and determined by the court, upon such notice to the commissioner and interested claimants as the court may prescribe. If the objection is sustained, the court shall direct an appropriate modification of the schedule. After filing the schedule, the commissioner may, from time to time, make partial distribution to the holders of claims which are undisputed or have been allowed by the court, if a proper reserve is established for the payment of disputed claims. As soon as is practicable after the determination of all objections, the commissioner shall make final distribution.

(h) (1) The following claims shall have priority:

(A) Obligations incurred by the commissioner;

(B) Wages and salaries of officers and employees earned during the three-month period preceding the commissioner's possession in an amount not exceeding six hundred dollars ($ 600) for any one (1) person;

(C) Fees and assessments due to the department; and

(D) Deposits to the extent of ten dollars ($ 10.00) for each depositor.

(2) After the payment of all other claims with interest at the maximum rate permitted on time deposits, the commissioner shall pay claims otherwise proper which were not filed within the time prescribed.

(3) If the sum available for any class is insufficient to provide payment in full, such sum shall be distributed to the claimants in the class pro rata.

(i) Any assets remaining after all claims have been paid shall be distributed to the stockholders in accordance with their respective interests.

(j) Unclaimed funds remaining after completion of the liquidation shall be transferred to the state treasurer to be dealt with in accordance with the provisions of the Uniform Disposition of Unclaimed Property Act, compiled in title 66, chapter 29.

(k) When the assets have been distributed in accordance with this chapter and chapter 1 of this title, the commissioner shall file an account with the court. Upon approval thereof, the commissioner shall be relieved of liability in connection with the liquidation and the charter shall be cancelled.

**HISTORY:** Acts 1969, ch. 36, § 1 (3.504); 1973, ch. 294, § 6; 1978, ch. 561, § 34; T.C.A., § 45-904; Acts 1983, ch. 78, § § 10, 11; 1999, ch. 112, § 15.